



In the Matter of:

DAVID SEXTON,

ARB CASE NO. 04-030

COMPLAINANT,

ALJ CASE NO. 2003-STA-00018

v.

DATE: April 29, 2005

**KROLL'S TRUCKING
(MURPHY'S GARAGE),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997). The Complainant, David Sexton, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Ed Baskaron, who operated Kroll's Trucking, terminated his employment in violation of the STAA's whistleblower protection provisions. The Administrative Review Board must determine whether the Administrative Law Judge (ALJ) properly found that Murphy's Garage was not Sexton's employer, and if so, whether that finding is sufficient to resolve Sexton's complaint. As explained below, we find that the ALJ's finding that Murphy's Garage did not employ Sexton is supported by substantial evidence but this finding does not resolve Sexton's complaint because the complaint was filed against Ed Baskaron and Kroll's Trucking, not Murphy's Garage. Thus, we must remand the case for further proceedings to complete the adjudication of Sexton's STAA complaint.

BACKGROUND

David Sexton alleges that between May and June of 2002, he was employed by Kroll's Trucking, which was owned and operated by Ed Baskaron. Recommended Decision and Order (R. D. & O.) at 2. Ed Baskaron's uncle, Roshdy (Rusty) Baskaron, owned and operated Murphy's Garage and Towing, and he permitted Ed to run Kroll's Trucking out of the Murphy's Garage premises with the understanding that if Kroll's

Trucking became a solvent venture, Ed would pay his uncle rent. *Id.* Rusty Baskaron also loaned Ed one of his trucks. *Id.*

Ed and his dispatcher, Angie Uribe, hired Sexton, and Ed paid him with checks drawn initially on a Kroll's Trucking bank account and ultimately on his personal account. *Id.* After Sexton first complained about the poor conditions of Kroll's Trucking's trucks and ultimately refused to drive the trucks, Uribe told him that he could either drive the trucks as they were or not drive at all. *Id.* at 3. Sexton decided not to drive the trucks. Sexton never worked for Rusty at Murphy's Garage and Towing. *Id.* Because Kroll's failed to turn a profit after three months, Rusty evicted Kroll's from his premises. *Id.* Kroll's ceased operation and Ed's "whereabouts are unknown." *Id.*

On October 18, 2002, Sexton filed a complaint alleging that Kroll's violated the STAA by terminating his employment in retaliation for complaining about the safety of Kroll's Trucking's vehicles. Specifically, he alleged that he "was terminated for refusing to drive a truck that was in poor repair and that was a safety hazard." Discrimination Case Activity Work Sheet, October 18, 2002.

Because Ed operated Kroll's out of Murphy's premises, Sexton provided Murphy's address to the OSHA investigator. He indicated that "Edward Baskaron" was the "President" of Kroll's, but he also provided contact information for "Rusty Baskaron." *Id.* The record indicates that, because Kroll's had been located at the same address as Murphy's, OSHA erroneously conflated Kroll's Trucking and Murphy's Garage and Towing as a single entity and assumed that Murphy's was Sexton's employer.¹

OSHA investigated Sexton's complaint and concluded that Sexton abandoned his position with "Kroll's Trucking (Murphy's Garage)." Secretary's Findings at 1. These findings were forwarded to Sexton and to "Mr. R. Baskaron, Kroll's Trucking (Murphy's Garage)." *Id.* The record does not indicate that Ed Baskaron participated in the investigation or was provided with a copy of the Secretary's findings.

Sexton appealed OSHA's findings to the Office of Administrative Law Judges. The ALJ conducted a hearing at which Sexton and Rusty appeared, but neither party was represented. The ALJ heard testimony from Sexton and Roshdy Baskaron. But the record does not indicate that either Ed Baskaron or any representative of Kroll's was informed of the hearings, and none participated. On December 1, 2003, the ALJ issued a R. D. & O. in which he concluded that that Murphy's Garage and Towing was not Sexton's employer and recommended that "the complaint against Murphy's Garage and Towing be dismissed." R. D. & O. at 2-3.

¹ R. D. & O. at 2. Although the ALJ concluded that Kroll's was a sole proprietorship operating out of Murphy's Garage and Towing, the record does not establish the corporate structure of Kroll's Trucking at the time of Sexton's employment.

JURISDICTION AND STANDARD OF REVIEW

This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).² The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2004). The Board issued a Notice of Review and Briefing Schedule on December 10, 2003, but neither party filed a brief in response to the order.

Under the STAA, the ARB is bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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 Envtl. Servs. v. 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 ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

The STAA provides that a "person" may not discharge, discipline or discriminate against an "employee" because the "employee" has engaged in certain prescribed protected activities. 49 U.S.C.A. § 31105(a). The term "person" is defined in the regulations implementing the STAA as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons." 29 C.F.R. § 1978.101(i). The term "employee" includes "a driver of a commercial motor vehicle ... who is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety..." 29 C.F.R. § 1978.101(d).

The record supports the ALJ's conclusion that Kroll's and Murphy's were separate entities. *See* R. D. & O. at 3-4; Tr. 55-58 (Sexton testimony).³ The record also

² "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

³ In ruling that Kroll's and Murphy's were separate entities, we rely solely upon the record evidence and testimony of individuals who provided sworn testimony at the hearing. *See Jackson v. Wyatt Transfer, Inc.*, ARB No. 01-076, ALJ No. 2000-STA-57 (ARB Apr. 30,

indicates that Sexton filed his complaint specifically against Kroll's Trucking. Sexton never alleged that he was an employee of Murphy's Garage and Towing, nor does he contend that Murphy's retaliated against him in violation of the STAA. Because none of the parties have contended that Murphy's either employed Sexton or violated the STAA, we **DISMISS** Murphy's Garage and Towing as a respondent in this case.

Although we dismiss Murphy's as a respondent, the record does not indicate that either Kroll's Trucking or a representative of Kroll's was ever informed of Sexton's complaint, OSHA's investigation into the complaint, or the proceedings before the ALJ. This leaves unresolved the issue of whether Kroll's Trucking violated the STAA. Because the ALJ has not disposed of Sexton's complaint against Kroll's Trucking, we **REMAND** this case to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

2003)(because unsworn testimony is potentially unreliable, it cannot provide the basis for critical findings that determine the rights and liabilities of parties).