



In the Matter of:

KEVIN J. HUSEN,

ARB CASE NO. 06-094

COMPLAINANT,

ALJ CASE NO. 2005-STA-1

v.

DATE: February 28, 2007

LLK TRANSPORT, INC.,

and

LORNE KOPISCHKE,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Kevin J. Husen filed a whistleblower complaint with the United States Department of Labor alleging that his employer, LLK Transport, Inc., and company owner, Loren Kopischke, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA).¹ The STAA prohibits certain employers from retaliating against employees who complain about or report violations of commercial motor vehicle safety requirements.² Husen alleged that he was fired shortly after he voiced concerns about the brakes on his assigned commercial motor vehicle.

¹ 49 U.S.C.A. § 31105 (West 2007).

² “A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding” 49 U.S.C.A. § 31105(a)(1)(A)(West 1997).

After investigating Husen's complaint, the Occupational Safety and Health Administration (OSHA) found that it was reasonable to believe that LLK Transport violated 49 U.S.C.A. § 31105 and it ordered the company to reinstate Husen and pay him back wages and attorney fees.³ Husen requested a hearing before a Labor Department Administrative Law Judge (ALJ) objecting to OSHA's failure to also impose individual liability on Kopischke.

At a hearing held on June 1, 2005, the ALJ granted Husen's motion to dismiss his claim without prejudice with respect to LLK Transport because it had ceased operations.

On October 15, 2005, Kopischke filed Chapter 7 bankruptcy, and on April 5, 2006, the bankruptcy court granted him an order of discharge of debtors. On April 24, 2006, the ALJ, citing the bankruptcy court's order, granted Husen's motion to dismiss without prejudice his claim against Kopischke.

The Secretary of Labor has delegated to the Administrative Review Board (ARB) the authority to issue final agency decisions under the STAA and the implementing regulations at 29 C.F.R. Part 1978.⁴ We automatically review an ALJ's recommended STAA decision.⁵ When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.⁶ The ARB reviews the ALJ's legal conclusions de novo.⁷ The Board is required to issue a final decision and order based on the record and the ALJ's recommended decision and order.⁸

³ OSHA Letter dated September 27, 2004. OSHA investigates STAA complaints and issues findings as to whether there is reasonable cause to believe that the employer has violated the STAA. If reasonable cause does exist, OSHA accompanies that finding with a preliminary order that provides certain prescribed relief. 29 C.F.R. §§ 1978.103, 1978.104 (2006).

⁴ See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

⁵ 29 C.F.R. § 1978.109(a).

⁶ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. 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).

⁷ *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).

⁸ 29 C.F.R. § 1978.109(c).

The Board issued a Notice of Review and Briefing Schedule, notifying the parties of their right to file briefs in support of or in opposition to the R. O., within thirty days from the date on which the ALJ issued the R. O.⁹ Husen filed a statement with the Board indicating that he did not intend to file a brief. Neither LLK nor Kopischke responded to the Board's notice.

Upon consideration of the ALJ's R. O. and the record, we conclude that the order of dismissal without prejudice comports with 29 C.F.R. § 1978.111(c), which permits a party to withdraw its objections to OSHA's investigative finding at any time before that finding becomes final.¹⁰ Accordingly, we **AFFIRM** that decision and dismiss the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

⁹ See 29 C.F.R. § 1978.109(c)(2).

¹⁰ This regulation provides in pertinent part:

At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge The judge . . . shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.