U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In The Matter of:

STEVEN L. JACKSON, **ARB CASE NO. 98-104**

COMPLAINANT, **ALJ CASE NO. 95-STA-38**

v. **DATE: May 29, 1998**

PROTEIN EXPRESS,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Administrative Review Board found that Respondent Protein Express (Protein) discriminated against Complainant Steven Jackson when it discharged him from his position as a truck driver for refusing to drive a truck he believed was unsafe, in violation of the employee protection provision of the Surface Transportation Assistance Act of 1982, as amended (STAA), 49 U.S.C.A. §31105 (West 1996). ARB Final Decision and Remand Order (Remand Order), Jan. 9, 1997, slip op. at 4. The Board remanded the case to the Administrative Law Judge for calculation of back pay, compensatory damages, if any, and attorney's fees. The ALJ submitted a Recommended Decision and Order on Remand (R. D. and O. on Remand) awarding $8,975 in back wages, with interest as provided in 26 U.S.C. §6621, and $6,461.70 in attorney's fees. ALJ R. D. and O. on Remand at 6. The ALJ did not award any compensatory damages.

Protein filed a brief in opposition to the R. D. and O. on Remand, arguing that the Board's Remand Order was contrary to law and that Jackson is not entitled to any relief. Protein argues that the Board improperly failed to treat the ALJ's original findings of fact as conclusive as required by the applicable regulation, 29 C.F.R. §1978.109(c)(3) (1996), and that the Board should have affirmed the ALJ's findings dismissing the complaint. In the alternative, Protein argues that if any back pay and attorney's fees should be awarded, the Board should reduce the amounts recommended by the ALJ.

1. Reconsideration of the Remand Order.

Protein's argument that the Remand Order should be reversed is in the nature of a motion for reconsideration, and such motions are generally disfavored. *INS v. Doherty*, 502 U.S. 314, 323 (1992); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (Reconsideration should be granted only to "correct manifest errors of law or fact or to present newly discovered evidence.") Nevertheless, we will consider Protein's arguments to clarify the holding in our earlier Remand Order.

As Protein correctly notes, the standard of review of an ALJ's decision under the STAA regulations provides that "[t]he findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive." 29 C.F.R. §1978.109(c)(3). The Board's Remand Order does not run afoul of that provision, however. There were two crucial points in the original recommended decision of the ALJ on which he either did not make a specific finding or with respect to which he did not apply the appropriate legal test.

First, the ALJ equivocated in his finding regarding Jackson's refusal to drive the tractor-trailer. The STAA protects an employee who refuses to operate a vehicle because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. §31105(a)(1)(B)(ii). In discussing whether Jackson was covered by this provision of the STAA, the ALJ stated that "Mr. Jackson's apprehension about driving the truck may have been reasonable or it may have been contrived." Sept. 8, 1996 Recommended Decision and Order (Sept. 8 R. D. and O.) at 9. In the absence of a specific finding by the ALJ on this point, the Board reached its own conclusion that Jackson's refusal to drive the tractor-trailer was protected under the STAA. The Board based this finding on documentary evidence that a mechanic who had inspected the equipment found problems with the brakes on both the tractor and trailer, and that the brakes actually were repaired only ten days after Jackson refused to drive. Remand Order at 3. In light of the lack of a finding by the ALJ on this issue, the STAA regulation's substantial evidence rule did not preclude the Board from reaching its own conclusion on this issue, *i.e.*, that Jackson had a reasonable apprehension of serious injury to himself or to the public related to the vehicle's condition. Further, as we stated in the Remand Order, the ALJ erred in striking (apparently as hearsay) Jackson's testimony that the mechanic at the repair shop advised Jackson not to drive the truck because it was unsafe. Remand Order at 1 n.2.

Second, the ALJ applied an incorrect legal standard in determining that Jackson was not fired, but instead abandoned his job. Sept. 8, 1996 R. D. and O. at 10. The ALJ focused exclusively upon the issue whether Jackson was, as a matter of objective fact, fired. As we noted in our Remand Order, '"whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer."' Remand Order at 4, quoting *Pennypower Shopping News, Inc. v. N.L.R.B.*, 726 F. 2d 626, 629 (10th Cir. 1984). As the Court in *Pennypower* noted:

> The fact that there is no formal discharge is immaterial if the words or conduct of an employer would logically lead an employee to believe his tenure had been terminated. . . . [S]ince the company created the ambiguity which reasonably caused the employees to believe they were discharged, or at least to believe their employment status was questionable due to their strike activity, the burden of the ambiguity must fall on the company.

Pennypower Shopping News, Inc. v. N.L.R.B., 726 F. 2d at 630.

Application of the correct legal standard to the uncontroverted facts regarding Jackson's departure from Protein led the Board to conclude that Jackson reasonably inferred that he had been fired. The owner of Protein, Timothy Grove, testified that Jackson called him asking that the truck be repaired or that he be given another truck to drive. According to Grove, Jackson said "I'm not driving [the truck] until it's fixed," Remand Order at 4. Grove also testified that after Jackson's January 14, 1995 exchange with Shelton, Jackson left a telephone message for Grove saying "[i]f I'm being fired, I want to hear it from you." Grove did not respond to Jackson's request for another truck to drive, nor did Grove respond to Jackson's message asking for clarification of his status. Ultimately, Shelton removed Jackson's belongings from the truck. Based on these transactions, we conclude that Jackson reasonably believed he had been fired.

Additional unrefuted facts regarding Shelton further support the conclusion that Jackson reasonably believed that he had been fired. Although the ALJ found that Shelton was not Jackson's supervisor, and therefore lacked authority to fire Jackson, the legal test requires that we focus on what Jackson reasonably would have inferred regarding supervisory authority. The ALJ made findings, which are supported by substantial evidence, from which we conclude that it was reasonable for Jackson to infer that Shelton possessed supervisory authority, including the authority to fire him, even if in fact Shelton did not possess such authority.

The ALJ found that, "Mr. Shelton testified that if the other drivers would see him [Shelton] before they saw Mr. Grove, that they would take their problems to him [Shelton] for some unknown reason. . . . When Mr. Grove is unavailable, drivers do contact Mr. Shelton with their problems . . . ." Sept. 8, 1996 R. D. and O. at 4-5. The ALJ also found that at least once Shelton had given Jackson 'a written warning to "drive slow" due to the weight of the vehicle.' *Id*. at 6. Finally, both Grove and Shelton testified that after Jackson complained to Grove about the tractor-trailer, Grove called *Shelton* to deal with the problem. It was this phone call from Grove which prompted Shelton to call Jackson on January 14, 1995. "Perry Shelton, an employee of Protein Express, telephoned Mr. Jackson. . . . Mr. Shelton asked Mr. Jackson whether he was going to drive the truck that day . . . . Mr. Jackson refused to drive the truck and did not ask whether another truck was available. . . ." *Id.* at 4. And although Jackson told Shelton not to remove his belongings from the truck, Shelton did so anyway.

The actions of Shelton (whom Jackson reasonably could have perceived as having supervisory authority) and Grove, when viewed in light of the proper legal standard, amply support

our conclusion that Shelton reasonably concluded that he had been fired. Remand Order at 4. The burden of ambiguity falls upon the Respondent. *See*, *Pennypower Shopping News, Inc. v. N.L.R.B.*, 726 F. 2d at 630. Thus the ALJ's conclusion that Jackson had not been fired is based on a faulty legal premise.

2. Remedies.

The ALJ found that Jackson would have worked four days a week on the day run at $75 per day and one night a week on the night run at $100 per night. He held that Jackson was entitled to back pay for the period from January 14, 1995, the date of discharge, to June 20, 1995, the last day of spring, because Jackson rejected an offer of reinstatement sometime in the spring. R. D. and O. on Remand at 4. *See also* Remand Order at 4. Protein points out, however, that the unrefuted testimony of Grove, the owner of Protein, was that the number of runs per week on the route Jackson drove was significantly reduced starting in mid-January 1995 because of the loss of a major client. *See* Transcript of hearing at 105. Protein submits that Jackson is entitled to back pay only for three days per week from January 14 to June 17, for one night run every other week, and for $175 for one day run and one night run from June 17 to June 20, for a total of $6,225. Based on Grove's unrefuted testimony about the amount of work available during the period after Jackson was discharged, we adopt Protein's proposed calculation of back pay.

The ALJ denied compensatory damages Jackson requested for interest on an automobile loan, and we concur. Jackson purchased the car before he was terminated by Protein, T. 72, so that the interest cannot be considered damages caused by his unlawful discharge.

The ALJ also awarded $6,461.70 in attorney's fees based on itemized billing records submitted by Jackson's attorney. Protein objects to an award of attorney's fees for time spent on a motion for default judgment and a motion to compel because the ALJ denied an award of these costs in his September 8, 1996 Recommended Decision and Order and the Board's Remand Order did not reverse that finding. We do not agree. The STAA provides that, when an order is issued in favor of the complainant, "the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint." 49 U.S.C.A. §31105(b)(3)(B). Time spent in preparation of discovery and procedural motions is a cost reasonably incurred in bringing the complaint and is recoverable under the statute. We adopt the ALJ's recommendation of an award of attorney's fees of $6,461.70.

Accordingly, it is ordered that Respondent Protein Express pay Complainant Steven Jackson $6,225 in back wages, with interest as provided in 26 U.S.C. §6621, and $6,461.70 in attorney's fees.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member