



In the Matter of:

JOSEPH LEWMAN,

ARB CASE NO. 07-015

COMPLAINANT,

ALJ CASE NO. 2006-STA-018

v.

DATE: October 31, 2007

KEN BRICK MASONRY SUPPLY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

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), and its implementing regulations, 29 C.F.R. Part 1978 (2007).¹ Joseph Lewman filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Ken Brick Masonry Supply terminated his employment in violation of the STAA. On October 27, 2006, an Administrative Law Judge (ALJ) issued an Order Dismissing Complaint, recommending that the complaint be dismissed. For the following reasons we dismiss the complaint.

¹ The STAA has been amended since Lewman filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to his complaint, they would not affect our decision.

BACKGROUND

Lewman worked as a delivery truck driver for Ken Brick Masonry Supply from approximately December 21, 2005 to January 26, 2006. On January 31, 2006, he contacted OSHA by telephone and alleged that Ken Brick Masonry Supply had discharged him. The OSHA employee who spoke to Lewman “didn’t get a definite answer regarding whether or not [Lewman] absolutely wanted a discrimination case opened.”²

OSHA initiated an investigation into the discharge allegation but was unable to reestablish contact with Lewman during the investigation. On March 2, 2006, OSHA dismissed Lewman’s complaint “due to a lack of cooperation.”³ On March 10, 2006, OSHA forwarded the complaint to the Office of Administrative Law Judges (OALJ).

On March 13, 2006, Lewman contacted OSHA by letter to contend that he was discharged because he refused to drive above the speed limit. Although the letter does not refer to OSHA’s findings, it suggests that Lewman intended to appear at a hearing on his complaint.⁴ On July 20, 2006, an ALJ issued a Notice of Hearing which he mailed to the address Lewman provided in his March 13, 2006 letter to OSHA.

The ALJ convened the hearing on Lewman’s complaint on September 21, 2006. Ken Brick Masonry Supply appeared at the hearing. Lewman failed to appear either in person or through counsel. In response, the ALJ issued a Show Cause Order on September 25, 2006, directing Lewman to “explain his failure to appear at the hearing and show cause, on or before October 13, 2006, why this matter should not be dismissed.” The Show Cause Order urged Lewman to seek the assistance of counsel and stated that if he did not respond, his complaint would be dismissed. Lewman did not respond to the Show Cause Order.

On October 27, 2006, the ALJ issued an Order Dismissing Complaint, concluding that Lewman’s complaint should be dismissed for his failure to respond to the Show Cause Order.

² See electronic message to Dennis Russell, OSHA Regional Supervisory Investigator, which has been attached to the OSHA Determination and is designated “ORIGINAL COMPLAINT 1/31/06 VERBAL.”

³ OSHA Determination at 3.

⁴ See Mar. 13, 2006 letter from Lewman to OSHA at page 2 (“I Joseph William Lewman will testified (sic) to and all about the complaint.”). OALJ received a copy of this letter on March 16, 2006.

This case is before the Board pursuant to the STAA's automatic review provisions.⁵ On November 14, 2006, the Board issued a Notice of Review and Briefing Schedule, informing the parties of their right to file briefs in support of or in opposition to the Order Dismissing Complaint. Neither party filed a brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations.⁶ The ARB is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."⁷ 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.⁸ The Board reviews questions of law de novo.⁹

DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution.¹⁰ 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."¹¹ Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." Thus, the Board will

⁵ "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." 29 C.F.R. § 1978.109(a).

⁶ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978 (2005).

⁷ 29 C.F.R. § 1978.109(c)(1).

⁸ 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).

⁹ *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

¹⁰ *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962).

¹¹ *Id.* at 630-631.

affirm an ALJ's recommended decision and order on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his or her case.¹²

Furthermore, the applicable Rules of Practice and Procedure permit an ALJ to dismiss cases when a party fails to comply with any of the ALJ's orders.¹³

The rules of procedure applicable to STAA hearings provide for dismissal of a complaint based on abandonment:

A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear.

29 C.F.R. § 18.39(b).¹⁴

Dismissal as a sanction for failure to prosecute is a matter within the ALJ's sound discretion.¹⁵ Lewman did not appear for his hearing and he failed to comply with the Show Cause Order by explaining his absence from the hearing. Nor has Lewman attempted to explain to the Board his failure to respond to the Show Cause Order.

¹² *Kruml v. Patriot Express*, ARB 03-015, ALJ No. 2002-STA-007, slip op. at 4-5 (ARB Feb. 25, 2004); *Ass't Sec'y for OSHA & Reichelderfer v. Bridge Transp., Inc.*, ARB No. 02-068, ALJ No. 2001-STA-040, slip op. at 3 (ARB Aug. 29, 2003); *Tucker v. Conn. Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-053, slip op. at 4 (ARB Mar. 15, 2002); *Curley v. Grand Rapids Iron & Metal Co.*, ARB No. 00-013, ALJ No. 1999-STA-039, slip op. at 2 (ARB Feb. 9, 1999).

¹³ *See* 29 C.F.R. § 18.6(d)(2)(v); *Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 2001-STA-039, slip op. at 4 (ARB July 25, 2003) (ALJ acted within range of his discretion in dismissing STAA complaints after complainant repeatedly ignored the ALJ's discovery and other orders.).

¹⁴ *Cf. Rose v. ATC Vancom, Inc.*, ARB No. 05-091, ALJ No. 2005-STA-014, slip op. at 3 (ARB Aug. 31, 2006).

¹⁵ *Ferguson v. Bomac Lubricant Techs., Inc.*, ARB No. 04-057, ALJ No. 2002-STA-027, slip op. at 15 (ARB June 29, 2005).

Having considered the record and the ALJ's reasoning, we conclude that Lewman's complaint should be dismissed because he abandoned his claim.

CONCLUSION

The Board **AFFIRMS** the ALJ's decision and **DISMISSES** Lewman's STAA complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge