



In the Matter of:

DUANE SCHOLL,

ARB CASE NO. 08-076

COMPLAINANT,

ALJ CASE NO. 2008-STA-026

v.

DATE: September 30, 2008

**ROGERS READY MIX AND MATERIALS,
INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND DISMISSAL ORDER

Duane Scholl complained that Rogers Ready Mix and Materials (Ready Mix) violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),¹ and its implementing regulations,² when it discharged him for making a safety complaint.

After an investigation, the Occupational Safety and Health Administration (OSHA) found that Scholl did not engage in activity protected under the Act when he informed Ready Mix's safety manager that he preferred to wear walking shoes, rather than over-the-ankle boots because his response time was quicker on the foot pedals when

¹ 49 U.S.C.A. § 31105 (West 2008), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. The amended provisions are not at issue in this case and thus do not affect our decision.

² 29 C.F.R. Part 1978 (2007).

driving the truck.³ Accordingly, OSHA dismissed the complaint.⁴ Scholl objected to OSHA's findings and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).⁵

The ALJ scheduled the case for hearing, but on April 1, 2008, Scholl's counsel filed a Motion for Voluntary Dismissal of Complaint with Prejudice. On April 3, 2008, the ALJ issued a Recommended Order of Dismissal (R. O.). The ALJ noted that pursuant to 29 C.F.R. § 1978.111(c), a "party may withdraw his objections to the findings or order [of OSHA] by filing a written withdrawal with the administrative law judge."⁶ Accordingly, the ALJ canceled the hearing and dismissed Scholl's appeal with prejudice. R. O. at 1.

The ALJ forwarded his recommended decision and the administrative record to the Administrative Review Board (ARB or Board) and the case is now before us pursuant to the STAA's automatic review provisions.⁷ The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.⁸ When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence in the record considered as a whole.⁹ In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"¹⁰ Therefore, the Board reviews the ALJ's legal conclusions de novo.¹¹

³ OSHA's Findings and Order, Jan. 7, 2008.

⁴ *Id.*

⁵ *See* 29 C.F.R. § 1978.105.

⁶ R. O. at 1. 29 C.F.R. § 1978.111(c) provides in relevant 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 or, if the case is on review, with the Administrative Review Board, United States Department of Labor.

⁷ *See* 29 C.F.R. § 1978.109(c)(1).

⁸ 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. § 1978.109(a).

⁹ 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).

¹⁰ 5 U.S.C.A. § 557(b) (West 1996).

On April 10, 2008, the Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to file briefs with the Board in support of or in opposition to the ALJ's recommended order within thirty days of the ALJ's decision, or by May 5, 2008.¹² Ready Mix responded to the Board's request indicating that it would not file a brief.

Accordingly, we **GRANT** Scholl's Motion for Voluntary Dismissal of Complaint with Prejudice as unopposed.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹¹ *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

¹² *See* 29 C.F.R. § 1978.109(c)(2).