In the Matter of:

DWAN STALWORTH,

COMPLAINANT,

v.

JUSTIN DAVIS ENTERPRISES, INC.,

RESPONDENT.

ARB CASE NO. 09-038

ALJ CASE NO. 2009-STA-001

DATE: June 16, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Dwan Stalworth, *pro se*, Gordon, Georgia

For the Respondent:
W. Kerry Howell, Esq., *Lumley & Howell, LLP*, Macon, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge*

ORDER OF REMAND

Dwan Stalworth filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that his former employer, Justin Davis Enterprises, Inc. (JDE) violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified,[1] when it terminated his employment because he made safety related complaints and refused to drive a truck due to

[1] 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009).

safety concerns. Hearing Transcript (Tr). at 11. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. After a hearing at which JDE failed to appear, a Labor Department Administrative Law Judge (ALJ) recommended that Stalworth be awarded back pay with interest and compensatory damages.

BACKGROUND

OSHA investigated Stalworth's complaint and concluded that JDE had not violated the Act; thus, OSHA dismissed the complaint. OSHA Findings at 2. The OSHA Findings listed both the correct Florida and Georgia addresses for JDE. Stalworth requested a hearing before an ALJ.

On October 10, 2008, the presiding ALJ sent a Notice of Assignment and Notice of Hearing via regular mail to both Stalworth and JDE, notifying them that he had scheduled a hearing on November 6, 2008, at 9:00 a.m. in Macon, Georgia, and directing them to exchange their pre-hearing submissions by October 23, 2008. The service sheet listed an incorrect Georgia address and an old Florida address for JDE.

On October 23, 2008, the ALJ issued an Amended Notice of Hearing listing the street address of the location of the hearing, and again listed that it was to take place at 9:00 a.m., in Macon, Georgia. The service sheet again listed an incorrect Georgia address and an old Florida address for JDE.

Stalworth appeared pro se at the November 6, 2008 hearing. JDE did not appear at the hearing. After the hearing, the ALJ issued an Order to Show Cause as to why a default decision should not be entered against JDE pursuant to 29 C.F.R. § 18.5 (2009) for failure to appear without good cause, citing *Husen v. Wide Open Trucking, Inc.*, ARB Nos. 05-115, 05-130, and for failure to comply with the Rules, citing *Ass't Sec'y & Marziano v. Kids Bus Service, Inc.*, ARB No. 06-068.

In response to the Order to Show Cause, JDE wrote a letter to the ALJ on letterhead listing JDE's address as 151 Lake Shore Drive, Madison, FL 32340, stating that it did not receive notification of the location of the November 6th hearing and that the service sheet on the Amended Notice of Hearing listed the incorrect address for its home office. JDE stated that its address was not 151 Lake Shore Drive, Madison, FL 32340, but was 378 E. Base St. Suite 216, Madison, FL 32340. JDE averred that it was not sure why their Macon, Georgia office did not receive a copy of the Amended Notice of Hearing because their address was correct on the service sheet. They stated that they received the Order to Show Cause because it was forwarded to them by their Macon, Georgia, office. JDE asked that this be taken into consideration and that it be able to state its case against Stalworth at a later date.

On December 19, 2008, the ALJ issued his Recommended Decision and Order (R. D. & O.), noting that JDE's letterhead on its response to the Order to Show Cause listed its address as

151 Lake Shore Drive, Madison, FL 32340, and that JDE had been served with Notice at this identical address. The ALJ found that JDE's response to the Show Cause Order was inadequate and disingenuous at best. Further the ALJ noted that JDE had been uncooperative and non-responsive after the hearing as well in response to the ALJ's attempts to have JDE provide written or oral testimony.[2] The ALJ concluded that Stalworth established a prima facie case of retaliatory discharge under the STAA and that, as JDE had defaulted, it failed to rebut that prima facie case by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. Consequently, the ALJ recommended that Stalworth be awarded back pay with interest and compensatory damages.

The Board issued a Notice of Review and Briefing Schedule permitting either party to submit briefs in support of or in opposition to the ALJ's order. JDE filed a brief in opposition to the ALJ's R. D. & O. JDE also filed a motion to file exhibits in excess of thirty pages and six exhibits. Stalworth did not file a brief.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001). The Secretary of Labor has delegated her authority to decide this matter as provided in 49 U.S.C.A. § 31105(b)(2)(C) to the Board. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See also* 29 C.F.R. § 1978.109(c).

The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings. *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115, ALJ Nos. 2004-SOX-020, 2004-SOX-036, slip op. at 8 (ARB June 2, 2006); *Waechter v. J.W. Roach & Sons Logging and Hauling*, ARB No. 04-183, ALJ No. 2004-STA-043, slip op. 2 (ARB Dec. 29, 2005). *See also Dickson v. Butler Motor Transit/Coach USA*, ARB 02-098, ALJ 2001-STA-039, slip op. at 4 (ARB July 25, 2003); *Link v. Wabash R. R. Co.*, 370 U.S. 626, 633 (1962).

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay,

[2] The ALJ stated in footnote 1 of the R. D. & O. that after he received JDE's letter of November 25, 2008, he provided JDE with available dates for a formal hearing. It is unclear to the Board whether this was an attempt to set up an additional hearing date after the hearing took place or whether the attempts were in fact made prior to the hearing date of November 6, 2008.

terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or 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).

To prevail on this STAA claim, Stalworth must prove by a preponderance of the evidence that he engaged in protected activity, that JDE was aware of the protected activity, that JDE took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action. *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004). If Stalworth fails to prove any one of these elements, we must dismiss his claim. *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

1. Default

In this case, the ALJ held a hearing and, although JDE failed to appear, took Stalworth's testimony. After the hearing, the ALJ ordered JDE to show cause why he should not enter a default decision against JDE. After finding JDE's response inadequate, the ALJ issued his R. D. & O., in which he reviewed the evidence that Stalworth submitted and Stalworth's testimony, which he found to be credible as to the rendition of the facts of the case.

The regulations at 29 C.F.R. § 18.39(b) governing proceedings before an ALJ provide that if a party fails to appear for a scheduled hearing without good cause "[a] default decision, under § 18.5(b), may be entered against [that] party. . . ." 29 C.F.R. § 18.39(b). Section 18.5(b) provides:

> *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the administrative law judge to find the facts as alleged in the complaint and to enter an initial or final decision containing such findings, appropriate conclusions, and order.

We have construed these two regulations to mean that when a respondent fails to appear at the hearing without good cause, the ALJ may take the allegations in the complainant's complaint as admitted and render a decision and order with findings and appropriate conclusions. *See Assistant Sec'y of Labor & Marziano v. Kids Bus Serv., Inc.*, ARB No. 06-068, ALJ No. 2005-STA-064, slip op. at 4-5 (ARB Dec. 29, 2006).

Accordingly, we consider whether the ALJ abused his discretion when he awarded JDE benefits in part because JDE failed to appear at the hearing. ALJs, like courts, are necessarily vested with the inherent power to manage their affairs so as to achieve the orderly and expeditious disposition of cases. *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, ALJ

No. 2005-ERA-024, slip op. at 4 (ARB Feb. 29, 2008). ALJs must exercise this power discreetly, however, fashioning appropriate sanctions for conduct which abuses the judicial process. *Id.* Because dismissal is perhaps the severest sanction and because it sounds "'the death knell of the lawsuit,' [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious." *Id.* (quoting *Somerson v. Mail Contractors of Am.*, ARB No. 02-057, ALJ Nos. 2002-STA-018, 2002-STA-019, slip op. at 8-9 (ARB Nov. 25, 2003) (citations omitted)).

The record shows that the OALJ sent the Notice of Assignment and Notice of Hearing to JDE at an incorrect address in Georgia and an old address in Florida. JDE did receive the Notice of Assignment and Notice of Hearing because the new tenant at the old Florida address forwarded it to JDE at its current Florida address. The Notice of Assignment and Notice of Hearing informed JDE that the hearing would take place on November 6, 2008, in Macon, Georgia. The notice did not list the address of the location of the hearing however. Additionally, JDE states that it called the number listed on the notice to ask for the street address, and was told that they would receive a notice in the mail with the hearing location. JDE never received the address for the hearing location because it was sent to an incorrect address in Georgia and an old address in Florida.

The ALJ correctly found that JDE's response to the show cause order was inadequate. It is unfortunate that the response was on old letterhead listing their old Florida address as their place of business. We note that while JDE called OALJ and was told that it would receive the address of the hearing location in the mail, due diligence required that JDE call again prior to the hearing because it knew that the hearing was to take place on November 6, 2008, and because it still did not know the exact location.

Viewing the entire record as a whole however, it is evident that OSHA sent its notices to JDE at its correct addresses. It sent its final investigative report to the correct Georgia address and the former Florida address, which was current at the time. It sent its findings to the correct Georgia and new Florida addresses. The record also shows that JDE diligently pursued its case before OSHA. Because JDE was a fully engaged party before OSHA, who had the correct addresses, JDE's arguments are credible.

The incorrect and old addresses were not in use after the OSHA findings were sent until the OALJ used them and it is unclear why OALJ used these incorrect and out-dated addresses. Thus, JDE is not entirely at fault and its conduct was not so egregious that JDE should be denied the opportunity to present its case.Our adversarial system relies upon the fundamental concept that decisions affecting parties' rights should not be made without giving those parties notice and the opportunity to be heard. *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union,* ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 7 (ARB Aug. 31, 2007). Therefore, because the OALJ erred in failing to serve JDE at the correct address, the ALJ abused his discretion in finding that JDE defaulted when it failed to appear at the hearing and in awarding the complainant remedies in reliance on the default. Accordingly, we remand this case to give JDE an opportunity to present its case.

2. JDE's Motion

JDE's motion to file exhibits in excess of thirty pages is hereby denied. The exhibits submitted with their brief to the Board are not part of the record developed before the ALJ and are not considered now because our decision is "based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c). *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-021 (ARB July 31, 2001). JDE may submit these exhibits in proceedings before the ALJ.

CONCLUSION

We **VACATE** the ALJ's default judgment and **REMAND** for further proceedings consistent with this Order.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge