U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 March 2011

In the Matter of:
JACINTO FERNANDEZ,
Complainant,

v. **Case No. 2010 FRS 00034**

FLORIDA EAST COAST RAILWAY,
Respondent.

DECISION AND ORDER

GRANTING EMPLOYER'S MOTION FOR SUMMARY DECISION

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. (Aug. 3, 2007) and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). This case is set for hearing April 5, 2011 in Miami, Florida.

The FRSA, at 49 U.S.C. § 20109, provides protections for railroad employees who engage in certain protected activities. Prior to 2007, the FRSA focused on the protection of employees who made complaints regarding hazardous conditions or other matters involving railway safety. Pub. L. 103-272, § 1(e), 108 Stat. 867. At that time, the statute did not prescribe any specific procedures for adjudication, and did not refer to the procedures of any other statute in Title 49. See 49 U.S.C. § 20109 (2007). The FRSA was amended on August 3, 2007, as part of the "9/11 Commission Act." Pub. L. 110-53, § 1521, 121 Stat. 444. This statute was enacted specifically to implement the recommendations of the 9/11 Commission.3 The 2007 amendment expanded the Act to provide protection for employees who made complaints regarding railroad security. It also added to the FRSA, for the first time, a new subsection that prescribed procedures for adjudicating complaints. Actions under the FRSA are to be "governed under the rules and procedures set forth at [49 U.S.C.] Section 42121(b)." §1521(c)(2), 121 Stat. 447. In addition, a separate subsection set forth remedies for successful complainants. §1521(d), 121 Stat. 447, codified at 49 U.S.C. § 20109(e). The FRSA amendment at § 1521 did not provide any specific remedy to an employer that has been the subject of a frivolous complaint.

A separate provision of the "9/11 Commission Act" instituted the National Transit Systems Security Act (NTSSA), Pub. L. 110-53, § 1413, 121 Stat. 414, codified at 6 U.S.C. § 1142. See Pub. L. 110-53, §§ 1401-1413, 121 Stat. 400-17, codified at 6 U.S.C. §§ 1131-42. This provision provided protections against retaliation against employees of public transportation agencies who report hazardous safety or security conditions or engage in other specific types of protected activity. The NTSSA at § 1413(c) set forth specific procedures for adjudicating complaints, and listed the remedies that may be ordered in cases where a complainant is a prevailing party. In addition, NTSSA included a provision authorizing the Secretary of Labor to

award attorney's fees in an amount not exceeding $1,000 to a "prevailing employer" where the Secretary has determined that an employee's complaint is "frivolous" or has been "brought in bad faith." § 1413(c)(3)(D), 121 Stat. 417, codified at 6 U.S.C. § 1142(c)(3)(D). Interim regulations, governing both the FRSA and the NTSSA, were published on August 31, 2010, and were effective on that date. See "Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act," 29 Fed. Reg. 53,522 (Aug. 31, 2010), codified at 29 C.F.R. part 1982. The regulation paralleled the provisions of § 1521 and § 1413 of the "9/11 Commission Act" by providing for recovery of attorney's fees against a complainant who filed a frivolous or bad faith complaint under the NTSSA but not the FRSA. Specifically, the regulation states:

> If, upon the request of the respondent, the ALJ determines that a complaint filed under NTSSA was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney's fee, not exceeding $1,000.

3 Pub. L. 100-53, § 1(a), 121 Stat. 266. 75 Fed. Reg. 53,532, codified at 29 C.F.R. § 1982.109(d)(2). See also 75 Fed. Reg. 53,523 (discussion of Secretary's authority under NTSSA to award prevailing employer an attorney's fee). The regulation does not contain any provision for recovery of attorney's fees by the employer against a complainant who filed a complaint under the FRSA

Complainant, by counsel, filed an objection on September 1, 2010 to certain findings made by OSHA relating to an allegation that Respondent harassed, delayed and interfered with medical treatment.

On February 15, 2011, Respondent filed a Motion for Summary Decision. 29 C.F. R.1840 (d) sets forth in part,

> The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

The purpose of summary judgment is to promptly dispose of actions in which there is no genuine issue as to any material fact. ***Green v. Ingalls Shipbuilding, Inc.***, 29 BRBS 81 (1995); ***Harris v. Todd Shipyards Corp***., 28 BRBS 254 (1994). The evidence and inferences are viewed in the light most favorable to the non-moving party. ***Dunn v. Lockheed Martin Corp.***, 33 BRBS 204, 207 (1999).

29 C.F.R § 18.6 Motions and requests, sets forth in part,

> (b) Answers to motions. Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the motion, accompanied by such affidavits or other evidence as he or she desires to rely upon. Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.

As of this date, the Complainant has not responded to the Motion

MOTION TO DISMISS

Respondent argues that undisputed evidence shows that it did not violate the provisions of 49 U.S.C. §20109. Respondent submits that Complainant and his attorney are improperly using 49 U.S.C. §20109 in an attempt to perform an "end run" around the exclusivity provisions of the Federal Employers Liability Act (FELA). It argues further that there is nothing in the plain language of 49 U.S.C. §20109 that requires a railroad to pay for medical treatment. Instead, under the FELA, Respondent argues that it is entitled to a jury determination on the issues of whether it was negligent in connection with the accident and, if so, whether Complainant's medical bills were caused by its negligence.

Respondent further alleges that it did not harass, intimidate, discipline or fail to provide prompt medical attention to Complainant after the accident, and in fact, continued to pay for medical treatment while he was compliant with Respondent' s company policies regarding the payment of medical expenses for on-the-job injuries. It also alleges that once Complainant made the decision to stop participation in the medical management program, he was not further entitled to payment of medical expenses.

Respondent attached documents from a state filed a civil action arising under the FELA, alleging that he sustained injuries to his pelvis, hip and right shoulder as a result of the negligence of Respondent. Complainant alleges that Respondent was negligent in maintaining a coupler mechanism on two railroad cars which caused an injury and seeks medical benefits and damages. Had the Complainant has filed the complaint in United States District Court based on the same facts that constituted his action before the Office of Administrative Law Judges, jurisdiction would have been divested. See ***Stone v. Duke Energy Corp***, 432 F.3d 320 (5th Cir. 2005)(Sarbanes- Oxley case); see also ***Kelly v. Sonic Automotive, Inc.***, ARB No. 08-027 (Dec. 17, 2008)(Sarbanes-Oxley case).

Respondent argues that the FELA provides the exclusive remedy for railroad employees injured while performing railroad work in interstate commerce. N***ew York Central R.R. Co. v. Winfield***. 244 U.S. 147 (1917). It argues that the FELA is intended to supersede all state laws relating to the liability of a railroad for injury to its employees engaged in interstate commerce. Unlike state workers' compensation statutes which do not require proof of fault, an injured railroad employee must prove negligence in order to recover under the FELA. See, ***Davis v. Burlinuton Northern, Inc***., 541 F. 2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976) and ***Stillman v. Norfolk & Western Ry. Co***., 811 F.2d 834 (4th Cir. 1987).

Documents provided show that Complainant has requested a jury determination regarding whether Respondent was negligent or violated any federal safety regulations in connection with his accident and. if so, whether the alleged medical problems were caused by the negligence of Respondent. None of the documents before me set forth notice or facts that evoke an allegation of whistleblowing or retaliation for whistleblowing.

FINDINGS OF FACT

I find that the Complainant has defaulted in this matter by failing to respond to the Motion to Dismiss.

Alternatively, after a review of the civil action, and the documents attached, it is reasonable that the demand before me is limited to a claim for further medical treatment for work

related injuries. This is not a complaint regarding hazardous conditions or other matters involving railway safety, railroad security or any other specific type of protected activity.

CONCLUSION OF LAW

The claim is **DISMISSED** and the hearing is **CANCELLED**.

SO ORDERED

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix

(one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).