

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 August 2013

Case No.: **2010-FRS-12**

In the Matter of:

ROBERT HENDERSON,
Complainant,

v.

WHEELING & LAKE ERIE RAILWAY CO.,
Respondent.

Appearances:

Robert Henderson
Pro Se Complainant

Thomas E. Dover, Esq.
Julie L. Juergens, Esq.
Gallagher Sharp
Cleveland, Ohio
For the Respondent

Before: Alice M. Craft
Administrative Law Judge

**DECISION AND ORDER DISMISSING THE CLAIM
AND CANCELLING THE HEARING**

This claim is set for hearing on September 17, 2013, in Akron, Ohio. It is now before me on the Respondent's motion to dismiss the claim because the Complainant failed to comply with my order requiring him to respond to the Respondent's discovery. For the following reasons, I find that the motion should be granted.

I held a telephone conference on this claim on March 18, 2013. After the conference, I issued an order requiring the parties to complete discovery by July 16, 2013, and setting the hearing for September 17, 2013. On May 15, 2013, the Respondent filed a motion to compel the Complainant to respond to its discovery. The Complainant did not respond to the motion. On June 12, 2013, I issued an order to the Complainant to respond to the Respondent's discovery by July 15, 2013. When the Complainant still did not respond to the discovery, on July 30, 2013, the

Respondent filed a motion to dismiss the claim. I then issued an order to the Complainant to show cause why his claim should not be dismissed. The Complainant responded that the discovery did not relate to the unsafe equipment and conditions of the job he and other employees were exposed to at work. The Employer replied that its discovery related to the Complainant's damages, mitigation of damages, his ability to work, and witnesses and documents he expected to introduce at the hearing.

I have reviewed the Respondent's discovery, and find that it properly sought information needed to defend the claim and prepare for hearing. The Complainant has failed to offer any legitimate reason for refusing to respond to the discovery. The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide a judge several options when a party fails to comply with an order compelling discovery, ranging from drawing adverse inferences against the non-complying party or excluding evidence, up to and including rendering a decision against the non-complying party.¹ Under the circumstances of this case, I find that the complete failure of the Complainant to comply with my order or to respond to any of the Respondent's discovery warrants dismissing the claim.

IT IS THEREFORE ORDERED that the Respondent's motion to dismiss the Complaint filed on July 30, 2013, is **GRANTED**. The claim is **DISMISSED**. The hearing set for September 17, 2013, is **CANCELLED**.

Alice M. Craft
Administrative Law Judge

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.² Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically.³

¹ 29 C.F.R. §18.6(d) (2013).

² See 29 C.F.R. § 1982.110(a).

³ 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, Division of Fair Labor Standards. 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.⁴ 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.⁵

⁴ See 29 C.F.R. §§ 1982.109(e) and 1982.110(a).

⁵ See 29 C.F.R. §§ 1982.110(a) and (b).