



Issue Date: 30 April 2010

CASE NO.: 2010-STA-00026

In the Matter of:

CRIS BOOTH,
Complainant,

vs.

WRR ENTERPRISES, INC.,
Respondent.

ORDER DENYING RECONSIDERATION ON REMAND

This is a complaint under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105. In his complaint, Complainant identified the respondent employer as “WRR Enterprises, Inc. of Salt Lake City.” I determined that Complainant never worked for that employer. Complainant amended his complaint to name “WRR Industries, Inc.” of Salt Lake City, Utah as the respondent employer. He gave as that employer’s address 570 West 400 South, Salt Lake City, Utah 84101-1109, and as that employer’s mailing address Post Office Box 27597, Salt Lake City, Utah 84129.

On March 31, 2010, I remanded to the Occupational Health and Safety Administration. That is the Agency with whom a complainant must file an initial claim under the statute. As I stated in the Order, the remand was to give OSHA an opportunity to investigate the correct employer’s conduct.

On April 28, 2010, OSHA appeared through the Solicitor. It argued that a remand to investigate exceeds an administrative law judge’s authority, that OSHA had good reasons to conclude its investigation and dismiss the complaint irrespective of who the employer might be, and that it would not reopen its investigation.

I construe this as a motion to reconsider the Order of Remand. I have considered OSHA’s arguments and the additional facts that it presents about why it dismissed the complaint. OSHA might well choose to dismiss the matter again without anything further and notify the parties (including the correct employer). But I find no basis to modify the Order of Remand.

Discussion

An administrative law judge has authority to remand an STAA matter to OSHA. Except as provided in the STAA regulations, 29 C.F.R. Part 1978, this Office conducts proceedings under

the Act in accordance with this Office’s general rules of practice and procedure as set out in 29 C.F.R., Part 18. 29 C.F.R. §1978.106(a). Those rules give an administrative law judge “all powers necessary to the conduct of fair and impartial hearings.” 29 C.F.R. §18.29.¹ This broad delegation includes the power in STAA cases to remand, for example, to add necessary and indispensable parties. *See White v. “Q” Trucking*, 93-STA-28 (ALJ 11/9/93).

When the Secretary decides to preclude administrative law judges from remanding to OSHA (including remands to complete an investigation), she is fully able to do so: She has done so repeatedly in implementing regulations for certain other whistleblower statutes. *See, e.g.*, 29 C.F.R. §1979.109(a) (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century: “A complaint may not be remanded for the completion of an investigation . . . on the basis that a determination to dismiss was made in error”); 29 C.F.R. §1980.109(a) (Sarbanes Oxley Act: same); 29 C.F.R. §1981.109(a) (Pipeline Safety Improvement Act: same).² Nothing in the STAA implementing regulations has such a limiting effect.³

In the present case, the Order of Remand affords OSHA an opportunity to reopen its investigation. I took this step in deference to the regulatory scheme. That scheme acknowledges that most truck drivers don’t have the resources to investigate on their own and, left to themselves, will be unable to vindicate the public interest in safe roadways. That’s why OSHA has an investigative staff and must rely on truckers to blow the whistle. If OSHA has determined

¹ An administrative law judge’s authority includes, among others, the powers to:

Take any action authorized by the Administrative Procedures Act;

Exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary of Labor as are necessary and appropriate therefor;

Where applicable, take any appropriate actions authorized by the Rules of Civil Procedure for the United States District Courts; and

Do all other things necessary to enable him or her to discharge the duties of the office.

29 C.F.R. 18.29(6-9). Administrative law judges routinely remand cases under the Longshore and Harbor Workers’ Compensation Act to the District Directors, Office of Workers’ Compensation Programs, under the same delegation of powers.

² Despite the regulatory language to the contrary, OSHA has requested remands of Sarbanes-Oxley cases when the wrong employer has been named. *See, e.g., Nommensen v. Northstar Financial*, OALJ Case No. 2009-SOX-53, “Order Remanding Case to OSHA,” 9/17/2009.

³ OSHA misplaces its reliance on *dicta* in *Freeze v. Consolidated Freightways, Inc.*, ARB Case No. 04-128, 2005 WL 2119655 *1 n.3 (ARB 2005). Without disturbing the process that had occurred below in that case – including the administrative law judge’s remand to OSHA – the Board suggested that it would have been more expeditious had the administrative law judge simply dismissed what was before him and allowed the complainant to initiate a new and unrelated claim with OSHA. The Board noted that the STAA and its implementing regulations did not vest administrative law judges with authority to compel OSHA to investigate. Of course that is correct, but then neither does the Longshore Act or its regulations provide for remands, and yet remands are routine under that Act. The remand authority comes from the generally applicable procedural rules in 29 C.F.R., Part 18, which the STAA incorporates by reference, not from the STAA itself. More to the point is that nothing in the STAA’s implementing regulations *divests* administrative law judges of the authority under those general rules (unlike the regulations implementing Sarbanes-Oxley, AIR 21, Pipeline Safety and certain other environmental whistleblower statutes).

not to reopen its investigation, I urge that it dismiss again and give notice to the Complainant and the correct Respondent. Those parties can then request a hearing from this Office in the ordinary course if that is their choice.

Order

I have reconsidered the Order of Remand. OSHA's request that I rescind it is DENIED.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge