



Issue Date: 10 January 2012

CASE NO.: 2010-STA-00021

In the Matter of:

**SHEILA R. CUNNINGHAM,
Complainant,**

v.

**SARGENT FAMILY TRANSPORT,
Respondent.**

FINAL ORDER OF DISMISSAL

The matters before the undersigned administrative law judge are the Show Cause Order issued in this matter on September 8, 2011, in response to Respondent's second (August 31, 2011) dismissal motion, and Respondent's third motion to dismiss, filed on October 26, 2011. Complainant is unrepresented in this matter. Inasmuch as Complainant has failed to respond to the two dismissal motions or Show Cause Order and has not taken any action in furtherance of her claim, this matter will be dismissed.

Prior to issuing this Order, I sought to schedule a conference call between the parties to determine whether Complainant understood that this action would be dismissed unless she responded in some manner to the Show Cause Order and motion to dismiss. A conference call was held on January 10, 2012. At that time, Ms. Cunningham verified that she did not intend to go forward. She indicated that she had been unable to retain counsel and would not oppose the motion to dismiss.

Background

This case, which arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) (49 U.S.C. §31101 *et seq*) been set for a hearing four times previously and the hearings have been canceled for various reasons. The first hearing, scheduled for March 2 to 3, 2010, was canceled by the undersigned because neither party was represented, there had been ex parte contacts with my office by both parties, and there had been no prehearing filings. A telephone conference was held instead on the scheduled hearing date; it was transcribed. A second hearing was scheduled for June 22, 2010 and Respondent filed a prehearing statement, but Complainant did not. Another telephone conference (also transcribed) was held on June 9, 2010, after Respondent obtained representation. The second scheduled hearing was continued, without opposition, so that Complainant could have additional time to seek representation. A third conference call was held on October 14, 2010 but was not

transcribed. The third scheduled hearing, set for October 20 to 21, 2010, was canceled because Complainant had been unable to obtain representation and her own preparation was hampered by her broken right arm, as she is right handed. A fourth hearing was tentatively scheduled for January 11 to 12, 2010, but that too was canceled because Complainant's arm was not healing properly. Neither party responded to the Order Canceling Tentatively Scheduled Hearing and Requiring Response of December 20, 2010, which ordered the parties to jointly or separately provide suggested hearing dates.

Respondent filed a Motion to Dismiss by facsimile on January 3, 2011. In the Motion to Dismiss, Respondent noted that Complainant had failed to respond to previous Orders requiring prehearing filings of witness and exhibit lists and document exchange and had failed to show good cause for her noncompliance. Respondent also argued that Complainant had failed to show good cause for the previous delays, citing 29 C.F.R. §1978.106(b), relating to expedited procedures for STAA cases.

On March 4, 2011, I issued an Order to Show Cause, which ordered Complainant to show cause why this case should not be dismissed for failure to prosecute and, in any response filed, to suggest hearing dates.

Complainant responded by facsimile on April 1, 2011, indicating that she was just beginning to get back use of her right arm and she needed to obtain additional information from the Nebraska Department of Transportation; she also indicated that she was getting some information that she would sent out. No further submissions were made, however.

On May 23, 2011, I issued an Order Denying Dismissal and Fourth Notice of Hearing, which tentatively set the matter for September 22 to 23, 2011, at a location to be determined. That Order found Complainant's response adequate and denied Employer's motion to dismiss; however, it specifically required the Complainant to provide this tribunal and Respondent with her final witness and exhibit list and provide Respondent copies of her exhibits on or before August 22, 2011. The Order specifically provided:

Complainant is cautioned that this matter may be dismissed if she does not comply with future Orders.

On August 31, 2011, Employer filed a second Motion to Dismiss this action based upon Complainant's failure to comply with this tribunal's Orders. Respondent pointed out in its motion that Complainant failed to provide her final witness and exhibit list and copies of exhibits to Respondent on or before August 22, 2011, as required.

On September 8, 2011, I issued an Order Canceling Fourth Noticed Hearing and to Show Cause. That Order canceled the hearing tentatively scheduled for September 22 because Respondent would be hampered in its hearing preparation without being provided with a list of witnesses and exhibits and there would be no point in going forward with the hearing if Complainant was not prepared to put forth her case. The Order explained that Complainant would be well advised to seek the services of an attorney but that if she failed to do so, she would still be required to comply with Orders of this tribunal and to be prepared to prosecute her

case. The Order further stated: “If she has no witnesses besides herself and no exhibits, she need only advise Respondent and this tribunal of that; if she has witnesses and exhibits, however, they should be listed and copies of the exhibits should be provided.” Complainant was again cautioned that failure to comply with an Order without good cause for doing so could be grounds for dismissal and she was ordered to show cause, if there was any, why this matter should not be dismissed. No response was filed by Complainant to that Order.

Respondent filed a third Motion to Dismiss on October 26, 2011 based upon Complainant’s failure to respond to the previous Orders. Complainant did not respond to the motion.

As noted above, a conference call was held on January 10, 2012, at which time Complainant indicated that she did not oppose dismissal.

Dismissal

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) (49 U.S.C. §31101 et seq), with implementing regulations appearing at 29 C.F.R. Part 1978. Under 20 C.F.R. §1978.100(b) and 1978.106(a), the rules of procedure set forth in 29 C.F.R. Part 18 are applicable to proceedings under the STAA when not addressed by the STAA provisions. These provisions do not directly address the authority of an administrative law judge to dismiss a case for failure to prosecute, but the Administrative Review Board has recognized a tribunal’s inherent authority to do so when a party has essentially abandoned his case. *See Somerson v. Eagle Express Lines, Inc.*, ARB Case No. 06-023, ALJ Case No. 2004-STA-12 (November 30, 2006).

In *Somerson*, the administrative law judge had dismissed a case for failure to prosecute, citing his authority to enter a default judgment against a party for failure to appear at a properly noticed hearing without good cause, 29 C.F.R. § 18.5(b) and §18.39(b); to render a decision against a party who fails to comply with an order, 29 C.F.R. § 18.6(d)(2)(v); and to take actions necessary to conduct fair and impartial hearings, 29 C.F.R. § 18.29(a)(1-9). In affirming the dismissal, the Administrative Review Board stated:

We have observed that “the Department of Labor’s Administrative Law Judges and this Board must necessarily manage their dockets in an effort to achieve the orderly and expeditious disposition of cases. Thus, the Board will affirm an ALJ’s recommended decision and order on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his or her case.” *Larue v. Kllm Transport, Inc.*, ARB No. 02-024, ALJ No. 01-STA-54, slip op. at 2 (ARB July 22, 2003) (quotations and citations omitted). We have reviewed the record in this matter and conclude that the ALJ correctly applied the law to the facts. It is clear that, by failing and refusing to obey the ALJ’s orders, by not demonstrating good cause, and by failing to brief arguments before us, Somerson has abandoned his right to pursue his STAA claim.

Somerson, supra.

Dismissal for failure to prosecute is a remedy that is not frequently invoked. However, where, as here, a complaining party has shown no interest in pursuing an action, dismissal is mandated. Here, Complainant failed to respond to orders of this tribunal that required the production of a witness and exhibit list and suggested trial dates. She also failed to respond to the most recent order asking why this case should not be dismissed. At the recent conference call, she indicated that she did not intend to pursue this case and did not oppose the motion to dismiss. Under these circumstances, Respondent's motion to dismiss will be granted. Accordingly,

ORDER

IT IS HEREBY ORDERED that Respondent's motion to dismiss be, and hereby is **GRANTED** and the instant case be, and hereby is, **DISMISSED WITH PREJUDICE**.

A

PAMELA J. LAKES
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. § 1978.110(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. § 1978.110(a).

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. § 1978.110(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.

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. §§ 1978.109(e) and 1978.110(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. §§ 1978.110(a) and (b).