**U.S. Department of Labor**

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

**Issue Date: 03 June 2014**

**CASE NO.: 2013-STA-60**

**IN THE MATTER OF:**

**CURTIS C. DICK**

**Complainant**

**v.**

**TANGO TRANSPORT**

**Respondent**

APPEARANCES:

CURTIS C. DICK, Pro Se

For The Complainant

BRIAN R. CARNIE, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

## ORDER DENYING MOTION FOR RECONSIDERATION

On April 18, 2014, the undersigned issued a Decision and Order dismissing Complainant's complaint against Respondent.

On May 5, 2014, by facsimile, Complainant filed a Motion For Reconsideration of the Decision and Order. Complainant indicates he received the Decision and Order on April 23, 2014. Complainant identified the following bases for reconsideration:

> (1) the undersigned erred when it was stated Tammy Lane Smith was Complainant's driver manager at the time he quit working for Respondent;
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> (2) the undersigned erred when it was stated Davini told Complainant he must have a trailer and could not use the vehicle for personal use;
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> (3) the undersigned erred when it was stated Complainant made a statement on January 27, 2012 that he was frustrated;
>
> (4) the undersigned erred when it was stated Respondent did not direct Complainant to call the Log Department "now;"
>
> (5) the undersigned erred when it was stated "that a driver is allowed to drive a truck home, but is not allowed to stop at a store while in route, which would amount to personal business;"
>
> (6) the undersigned erred when it was stated that Respondent chose to use the statement "other" to benefit Complainant's situation in the DAC report;
>
> (7) that the undersigned may have erred when relying "on hearsay testimony" from Nelson who initially testified conversations with Jan Baxter contributed to his decision not to rehire Complainant, but then changed his testimony to identify Tammy Lane Smith;
>
> (8) the undersigned may have made "reversible error" when conversations with Tammy Lane Smith were used as a reason to justify Respondent's actions after Complainant requested Tammy Lane Smith as a witness, but was denied by the undersigned;
>
> (9) during the pre-hearing conference, the undersigned "assured the Complainant" that there was no need to require Tammy Lane Smith to attend the hearing because records would speak for itself;"

(10) the undersigned denied Complainant the opportunity to question Tammy Lane Smith, then accepted hearsay testimony of alleged problems with Complainant as a legitimate reason not to rehire him;

(11) the undersigned ignored Complainant's brief that addresses the credibility of Respondent; and

(12) that at the conclusion of the hearing, Complainant, Respondent and the undersigned boarded the same elevator, but Complainant left the elevator and "if any words were spoken in relation to this case," it would be ex parte communication.

In summary, Complainant re-argues his case contrary to the evidence of record. Credibility of all witnesses was considered in the Decision and Order, including Complainant's credible testimony. Finally, Complainant contends that the undersigned erred by failing to find Respondent's reliance on Complainant's complaint letters as a reason for its alleged adverse actions in not re-hiring Complainant in July 2012.

On May 22, 2014, Respondent filed a Response to Complainant's Motion for Reconsideration. Respondent argues that Complainant's Motion is untimely since it was sent by facsimile on May 5, 2014, 17 days after the date of issuance of the Decision and Order. Complainant did not file an original Motion for Reconsideration. Respondent does not address any of Complainant's arguments set forth in his Motion for Reconsideration.

**DISCUSSION**

A motion for reconsideration is designed to correct factual errors. It is not a tool to be employed to induce a fact-finder to change his mind and it is not a means of correcting an error of law. Errors of law are corrected through the normal and prescribed appeal process. Alvested v. Monsanto, Co., 671 F.2d 908, 912 (5th Cir. 1982). A motion for reconsideration serves a limited purpose. On reconsideration, a party may not introduce new evidence or legal theories which could have been presented earlier. Reconsideration is appropriate when a fact-finder misunderstood a party or has made an error, not of reasoning, but of apprehension. Flowers v. Goldman, Sachs, & Co., 865 F.Supp 453 (N.D. Ill. 1994).

In Claimant's Motion For Reconsideration, he generally avers the undersigned should reconsider his factual and credibility conclusions. Although he disputes the findings and conclusions, he offers no logical or rational explanation for alternative findings. Several issues raised by Complainant which require further comment are treated specifically below.

In Surface Transportation Assistance Act cases, the Administrative Review Board applies a four-part test to determine whether the movant (here Complainant) has demonstrated: (1) **material** differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence; (2) **new material** facts that occurred after the court's decision; (3) a change in law after the court's decision; and (4) failure to consider **material** facts presented to the court before its decision. Abbs v. Con-Way Freight, Inc., ARB No. 12-016, ALJ No. 2007-STA-037 (June 11, 2013); Toland v. FirstFleet, Inc., ARB No. 09-091, ALJ No. 2009-STA-011 (ARB Mar. 8, 2011); Henrich v. Ecolab, Inc., ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB May 30, 2007); Getman v. Southwest Securities, Inc., ARB No. 04-059, ALJ No. 2003-SOX-008 (ARB Mar. 7, 2006). Only part (4) arguably applies in the instant matter.

It is noted that Complainant correctly points out that Tammy Lane Smith was not his driver manager at the time he quit his employment with Respondent in April 2013, but rather Jan Baxter was his manager. (Tr. 332). However, I do not find such an error to be material since Smith was alleged to have interrupted his breaks, which is his alleged protected activity, and, even if corrected in the Decision, would not change the determination of the undersigned.

Contrary to Complainant's reading of the record and the decision, he was told a tractor could not be used if a trailer was attached. (Tr. 41-42). Complainant confirmed that it would be fair to say he was upset and frustrated by all the issues he was having with his truck (Tr. 145), but recanted that he was not frustrated. (Tr. 146). Contrary to Complainant's assertion, the Qualcomm messages direct that he call Heather "ASAP." (Tr. 150-151; RX-2, p. 112).

Complainant also takes issue with Nelson's testimony concerning conversations with Baxter and Smith contributing to his decision not to rehire Complainant, however Nelson clearly testified that he relied upon conversations with Smith before being corrected that Baxter was not Complainant's driver manager

until he was rehired in October 2012. (Tr. 505). I find Nelson's clarification immaterial to the determination not to rehire since any complaints about which he based his decision, even if they came from Smith, were not deemed to be protected activity which contributed to Complainant's failure to be re-hired in July 2012. It is also noted that Complainant's complaints were in written form as well which were available to Nelson.

Complainant's argument that the undersigned committed reversible error by allowing Nelson to rely upon conversations with Smith to justify Respondent's refusal to hire him in July 2012, when Complainant's request for Smith's presence as a witness was denied, is specious. During the pre-trial conference with the parties on October 31, 2013, Complainant requested the appearance of seven witnesses from Respondent's office located in Shreveport, Louisiana, about 200 miles from the hearing location in Dallas, Texas. Respondent was ordered to make five of the seven witnesses available as witnesses at the formal hearing. Smith was not deemed necessary since allegations against Smith were set forth in the Qualcomm messages regarding interruptions in Complainant's break time and his written complaints filed with Respondent. Although Complainant also claimed Smith committed "many wrongs," no others were specifically alleged. The undersigned did not "assure" Complainant that there was no need for Smith to attend the hearing. Nevertheless, there was no need for her presence given the Qualcomm messages and Complainant's written complaints. Smith's "problems" with Complainant were documented. Moreover, Nelson did not testify to any specific conversations with Smith and, although he testified he did not rely upon any of Complainant's written complaints, no such complaints were deemed to be protected activity in any event.

Complainant's post-hearing brief, which was subsequently amended, was considered and, even though he contends Respondent's witnesses were not credible, he presented no evidence in support of his argument.

Complainant's speculation regarding ex parte communications between the undersigned and Respondent is also specious and without foundation and deserves no further comment.

I find Complainant's Motion For Reconsideration fails to establish the undersigned has made an error, not of reasoning, but of apprehension. The issues Complainant addresses in his Motion for Reconsideration were carefully, thoughtfully and cautiously considered in the Decision and Order. Complainant has presented no new evidence or legal theory which was not nor could not have been advanced earlier. Complainant simply re-argues his contentions considered and treated in the Decision and Order. Accordingly, I find no reason to depart from the findings and conclusions issued in the Decision and Order.

Respondent's Opposition to Complainant's Motion based on untimeliness is not persuasive. In the Decision's Notice of Appeal Rights, reconsideration is not mentioned, however Complainant was directed to file a Petition for Review within fourteen (14) days of the date of the issuance of the administrative law judge's decision. 29 C.F.R. § 1978.109. The decision issued on April 18, 2014. Complainant filed his Motion For Reconsideration on May 5, 2014, by facsimile.

The Rules of Practice and Procedure for Administrative Hearings Before The Office of Administrative Law Judges do not specifically provide for the filing of motions for reconsideration, but motions in general. However, in computing time under the Rules, when a party has a right or is required to take some action within a prescribed period after the service of a pleading, and the pleading is served upon said party by mail "five days shall be added to the prescribed period." 29 C.F.R. § 18.4(C)(3). Assuming reconsideration would be permitted within the fourteen day period,[1] Complainant thus had until May 7, 2014, to file his Motion For Reconsideration. Accordingly, I find his filing on May 5, 2014, to be timely.

[1] It is noted that the Rules of Practice and Procedure before the Administrative Review Board provide for reconsideration of its decisions to be filed within thirty (30) days from the filing of a decision. 20 C.F.R. § 802.407(a).

Upon review of Complainant's Motion and the Respondent's opposition, I determine that Complainant's Motion fails to demonstrate any material ground for reconsideration. Accordingly, Complainant's Motion For Reconsideration is **DENIED.**

**ORDERED** this 3rd day of June, 2014, in Covington, Louisiana.

Digitally signed by LEE J. ROMERO JR
DN: CN=LEE J. ROMERO JR, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

LEE J. ROMERO, JR.
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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 may be found to have waived 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(b). 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(b).