U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 February 2020

Case No.: 2019-STA-22

In the Matter of:

MICHAEL JOHNSON,
Complainant,

v.

NORFLEET TRANSPORTATION,
Respondent.

DECISION AND ORDER

This proceeding arises under the whistleblower protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. §31105. Michael Johnson ("Complainant") was a truck driver performing services for Norfleet Transportation ("Respondent") under a written Independent Contractor agreement.[1] Complainant alleges that Respondent unlawfully terminated his employment after Complainant brought certain safety issues to the attention of Respondent.

PROCEDURAL HISTORY

Complainant's last day of work with Respondent was November 30, 2015. On December 31, 2015, Complainant filed a Complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor. In his OSHA Complaint, Complainant alleged that he had been terminated from employment by Respondent in violation of the whistleblower protection provisions of STAA.

The OSHA investigation ended on November 19, 2018. Complainant requested a hearing before the Office of Administrative Law Judges of the Department of Labor on January 29, 2019. The case was assigned to me on February 27, 2019.

I conducted the formal hearing in the Tax Courtroom of the Birch Bayh Federal Building and United States Courthouse in Indianapolis, Indiana on January 7, 2020. Complainant testified at the hearing. Leonard Jackson, the Chief Executive Officer of Respondent, also testified at the hearing. Without objection, I admitted into the record Complainant's Exhibits ("CX") 1, 2, 3 and 4 and Respondent's Exhibits ("RX") A and B.

[1] Respondent's Exhibit A.

Complainant submitted a timely Post-Hearing brief.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, evidence and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

WHISTLEBLOWER PROTECTION UNDER THE ACT

The STAA prohibits an employer from discharging or discriminating against an employee[2] because the employee has engaged in certain protected activity. The employee protection provisions of the STAA[3] are these:

> Prohibitions: (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because: (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; (B) the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition; or (C) the employee accurately reports hours on duty pursuant to chapter 315;

Congress amended the STAA on August 3, 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C.A. §42121(b).[4] *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB Jun. 6, 2013); 49 U.S.C. §31105(b). The post-2007 standards of proof apply in this case. I also note the decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016). The ARB's decision in *Palmer* affect all cases (such as this one) where the whistleblower burdens of proof have been drawn from AIR-21.

[2] Independent contractors personally operating commercial motor vehicles enjoy the same whistleblower protection as "employees." 49 U.S.C. § 31105(j).
[3] 49 U.S.C. §31105.
[4] Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536.

The decision of the Administrative Review Board in *Palmer* describes the burdens of proof that will be applicable in this case. In order to prove a violation of the Act, Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; and (2) that Respondent took an adverse employment action against him, and (3) that his protected activity was a contributing factor in the adverse action. Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013). Complainant must also show that those imposing discipline on him were aware of the protected activity. If the employee does not prove one of these elements, the entire complaint fails. *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

If Complainant successfully proves that he engaged in protected activity, and also proves that his protected activity was a contributing factor in the decision to end his employment, then Respondent may nonetheless avoid liability if it demonstrates by clear and convincing evidence that the adverse employment action was the result of events or decisions independent of protected activity.[5] Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013). As the ARB explained in *Palmer*:

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

[5] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

Slip opinion at 32.

STATEMENT OF FACTS

Complainant and Respondent entered into an "Independent Contractor Operating Agreement" on or about October 22, 2015.[6] This appears to be a form agreement created by Respondent. Under this Agreement, Complainant was to use his own 2006 Peterbilt 387 tractor to pull loads dispatched to him by Respondent.

On November 29, 2015,[7] Complainant was dispatched by Respondent to pull a trailer from Plymouth, Indiana to Tyner, North Carolina.[8] Somewhere north of Lexington, Kentucky, one of the "steer tires"[9] on Complainant's tractor suffered a puncture.[10] At the same time, one of the tires on the trailer was also found to be flat.[11] CX 2 are a series of text messages between Complainant and Respondent from the afternoon and evening of November 29, 2015, in which they discuss the arrangements for replacing these flat tires.[12]

Complainant testified that this incident involving the punctured steer tire was "scary," and he was "shaken up" afterwards.[13] He testified that he had nearly lost control of the truck when the steer tire became flat. Complainant testified that he told a one of Respondent's dispatchers about his concerns, but the dispatcher told Complainant that he did not have the option to rest before proceeding. Complainant testified the dispatcher told him: "I was told you don't have that option. You have the hours, so you got to keep going."[14]

It took several hours to have the tire repairs made,[15] Complainant testified that after the repairs were done, he specifically told Leonard Jackson (Respondent's Chief Executive Officer) that he did not feel safe continuing his journey.[16] Complainant says he was told by Jackson "You have to continue driving because this load has to be delivered tomorrow morning."[17] For his part, Jackson does not recall speaking to Complainant on November 29, 2015, and denied that he ever told any driver to "drive unsafe."[18]

At the hearing, Complainant initially testified that he "refused to drive" after the tire repairs were made in the early evening of November 29, 2015. Complainant testified:

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[6] RX A.
[7] Tr. 32.
[8] CX 3 at 3.
[9] The "steer tires" are the two tires located at the front of the tractor which allow the tractor and trailer to be steered.
[10] Tr. 16.
[11] *Id*.
[12] As the owner of the tractor, Complainant bore the financial responsibility for repairing the steer tire. Respondent bore the expense for repairing the tire on the trailer. Tr. 55-6.
[13] Tr. 16.
[14] *Id.* at 17.
[15] *Id.* at 16.
[16] *Id.*
[17] CX 4 at 4.
[18] Tr. 81.

> MR. JOHNSON: Okay. As I stated before, I was told that I had to keep going. And I explained to Mr. Jackson at that time I didn't feel safe. The roads were dark, it was wet, it was still raining, I was still shaken from almost losing complete control of the vehicle, and he didn't seem to care about my concern as a driver.
>
> JUDGE BELL: So did you continue to drive?
>
> MR. JOHNSON: No, I refused to drive. I didn't feel safe.[19]

Complainant later seemed to change his testimony about what he did after the tires were repaired:

> JUDGE BELL: But tell me what happened after you had the repairs made to the truck. I want to understand where the truck went from the time the tires were repaired until you shut it down.
>
> MR. JOHNSON: After speaking with Mr. Jackson and he -- my contract was actually threatened that day, that if I don't continue driving, that after that load, then I would lose my contract.
>
> JUDGE BELL: Who said that?
>
> MR. JOHNSON: Mr. Jackson.
>
> JUDGE BELL: Okay. So what did you do?
>
> MR. JOHNSON: I continued driving.
>
> JUDGE BELL: For how long?
>
> MR. JOHNSON: About an additional four or five hours. I think I made it to the Virginia area from there.
>
> JUDGE BELL: Okay. I saw a reference in your papers to Fort Chiswell, Virginia.
>
> MR. JOHNSON: Yes. Yes.
>
> JUDGE BELL: Is that where you stopped for the night?
>
> MR. JOHNSON: Yes. I continued driving and I got to a truck stop there and I shut down for the night.[20]

[19] *Id*. at 20.
[20] *Id*. 24-5.

CX 4 is a narrative pre-hearing statement submitted by Complainant approximately one month before the hearing. In his pre-hearing statement, Complainant states the following:

> After departing the breakdown location in search of a place to shut down for the night, the Complainant received a call from Mr. Jackson asking for an ETA to the final. the Complainant explained to Mr. Jackson what he'd recently experienced and how it left him shaken and went on to explain that because of the weather and road conditions (rain, darkness and mountainous terrain) the complainant did not feel safe continuing to drive through the night. It was at this time that Mr. Jackson stated that 'You have to continue driving because this load has to be delivered tomorrow morning.' Again, the complainant expressed concerns for his safety to no avail. Mr. Jackson insisted that the Complainant continue driving and that if he did not continue driving that he would end the contract after this load was complete. In fear of losing the contract the Complainant had just gained, the Complainant reluctantly continued to drive approximately 5 hours and 30 minutes (almost exhausting his 14 hour clock) until Complainant arrived on November 30, 2015 at approximately 1:45am to the Flying J Truck Stop located in Fort Chiswell, Virginia.[21]

CX 4 nowhere claims that Complainant "refused to drive" at any time on November 29, 2015.

Complainant testified that on the morning of November 30, 2015, Leonard Jackson instructed Complainant to begin moving his truck before the conclusion of Complainant's mandatory rest period.[22] Complainant testified that he informed Jackson that he was not allowed to resume driving until the expiration of his rest period.[23] Jackson denies having this conversation. At the hearing, Jackson testified that "I never spoke to any driver in my whole career and told them to drive outside of their legal drive time, never."[24]

After Complainant resumed his trip on November 30, the drive shaft of his tractor "fell out,"[25] which rendered his tractor completely immobile. Respondent dispatched another tractor to pick up the trailer which was being pulled by Complainant. Complainant never again was dispatched a load by Respondent.[26] Complainant never again drove his 2006 Peterbilt tractor.[27]

[21] CX 4 at 4.
[22] Tr. 27, 28.
[23] *Id.* at 27
[24] *Id.* 81.
[25] *Id.* 28.
[26] *Id.* at 30.
[27] *Id.* at 29.

Complainant was never paid for the partial trip of November 29-30, 2015.[28] Complainant's entire work relationship with Respondent lasted less than 40 days.

MY ASSESSMENT OF COMPLAINANTS' CREDIBILITY

I presided over the formal hearing in this matter. I was able to observe Complainant as he testified. Such observations are useful to me when I am attempting to evaluate the credibility of any witness. Also helpful in making credibility determinations is the assessment whether the witness' testimony remained consistent during the hearing. I also look to see whether the witnesses' oral testimony is consistent with the other evidence in the record.

For almost all of the time this case was before me, both parties were unrepresented by counsel.[29] It did not appear that any formal discovery was occurring. I issued an Order requiring both parties to submit narrative position statements so each side would at least have an idea what claims and defenses were going to be presented at the hearing. CX 4 is the statement prepared by Complainant. I had reviewed CX 4 carefully before the hearing began.

As discussed above, CX 4 makes no claim that Complainant "refused to drive" on November 29, 2015. Instead, CX 4 indicates that Complainant drove for 5 hours and 30 minutes after Complainant alleges that he told Respondent that it was unsafe for him to continue his trip to North Carolina.[30] After reviewing all of the evidence in this case, I believe Complainant did, in fact, drive from Plymouth, Indiana to Fort Chiswell, Virginia from the afternoon of November 29 into the early morning hours of November 30, 2015. Complainant's testimony given at the hearing that he "refused to drive"[31] on November 29, 2015 because of safety issues perceived by him is not accurate, and is contradicted by Complainant's other testimony at the hearing[32] and by the pre-hearing statement created by Complainant.[33]

When assessing Complainant's credibility, I have tried to identify any documents that may have been created in close temporal proximity to the events at issue, and to then compare the content of any such documents to Complainant's oral testimony. The first such contemporaneous writings are the text messages compiled in CX 2. Complainant testified at the hearing that he had at least 2 telephone conversations with Respondent[34] on the afternoon of November 29, 2015. Complainant alleges that during those telephone calls, he expressed concerns for his safety if he were to resume his trip. CX 2 contains an exchange of text messages between Complainant and Respondent from 5:05 pm until 8:15 pm on November 29,

[28] *Id.* at 30. Paragraph 30 of the Independent Contractor Agreement (RX A) states that payment for trips will be made within 15 days after all appropriate documentation has been assembled. RX B is an email sent by Respondent to Complainant on December 10, 2015 asking Complainant to indicate in writing that Complainant wished to terminate the Independent Contractor Agreement. Attached to the email is a list of charges to be assessed by Respondent against Complainant's pay for the work he performed on November 29 and 30. A list of "fines" sought to be levied by Respondent against Complainant's pay is at RX B at 2.
[29] Respondent retained counsel only a few days before the hearing.
[30] CX 4 at 4.
[31] Tr. 20.
[32] *Id.* at 25.
[33] CX 4 at 4.
[34] One with an unnamed dispatcher, and one with Mr. Jackson.

2015, which is the precise period of time that Complainant says he developed reservations about continuing his journey, and during the time during which Complainant says he was instructed to keep driving. However, these text messages contain no indication that Complainant told Respondent that Complainant believed he was too fatigued to continue driving. Nor do the text messages contain any instructions given to Complainant by Respondent to keep driving.

A second roughly contemporaneous writing is CX 3. This is an email sent by Complainant to Respondent on December 10, 2015 – approximately one and a half weeks after the trip of November 29-30. In this lengthy email, Complainant expresses his overall dissatisfaction with how that trip was handled by Respondent. However, this email never alleges or suggests that Respondent had improperly directed Complainant to continue driving on the evening of November 29, 2015. Nor does it allege that Respondent had improperly directed Complainant to begin driving on November 30, 2015 before the conclusion of Complainant's mandatory rest period. Complainant's description of the events of November 29-30, 2015 given in CX 3 is inconsistent with the description he gave on the witness stand.

In reaching my decision in this case, I take into consideration the credibility assessment discussed above.

DISCUSSION

PROTECTED ACTIVITY

The protection afforded to whistleblowers under 49 U.S.C. §31105(a)(1)(B) includes refusals to drive where the employee has a reasonable apprehension that the operation of a vehicle would cause serious injury to himself or the public because of the vehicle's unsafe condition. "This clause of the STAA covers more than just mechanical defects of a vehicle - it is also designed to ensure "that employees are not forced to commit…unsafe acts " *Canter*, 2009-STA-00054, slip op. at 11 (citing *Garcia v. AAA Cooper Transp*., ARB No. 98 -162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998). The "apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous danger of accident, injury, or serious impairment to health." 49 C.F.R. § 31105(a)(2). In determining whether a "refusal to drive" merits STAA protection, the Court must consider the totality of the circumstances surrounding the refusal. *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000).

Complainant had the right to refuse to operate his truck on the evening of November 29, 2015 if he had a reasonable belief that he may cause injury to himself or others by continuing to drive. Complainant would also have been entirely within his legal rights had he refused to operate his truck on November 30, 2015 before he had reached the end of his mandatory rest period.

I find that Complainant has failed to prove by a preponderance of evidence that he was directed, instructed, pressured or otherwise compelled to operate his truck on the evening of November 29, 2015 after advising Respondent that he was too fatigued to safely drive. Jackson

denies giving such an instruction, and there is insufficient credible evidence supporting Complainant's allegation. No allegation of this type is contained in the contemporaneous documents.

Complainant did not actually refuse to drive on November 29, 2015. Claimant's contradictory testimony on this point is noted. The evidence is that Complainant drove for 5 hours and 30 minutes after he says he complained of fatigue.

Complainant has not proved by a preponderance of evidence that he was directed, instructed, pressured or otherwise compelled to drive on November 30, 2015 prior to the expiration of his mandatory rest period. Again, there is insufficient credible evidence in the record to support this claim. No allegation of this type is contained in the contemporaneous documents.

Complainant did not actually refuse to drive on November 30, 2015.

No other acts of alleged protected activity are described in CX 4 (Complainant's Pre-Hearing Statement) or in Complainant's Post-Hearing Brief.

Complainant has failed to prove that he engaged in protected activity.

ADVERSE EMPLOYMENT ACTION

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB adopted the "materially adverse" deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The majority for the ARB wrote: "*Burlington Northern* held that for the employer action to be deemed 'materially adverse,' it must be such that it 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" The majority further stated that the purpose of the employee protections that the Labor Department administers "is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes." *Melton*, slip op. at 20. Moreover, the majority believed that that both ARB and federal case law demonstrated that the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action. *Id.* The majority summarized:

> The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.…Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment.
> Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse" rather than "tangible consequence,"

> or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent.

Id. at 23.

Complainant has not satisfied his burden to prove that he suffered an adverse employment action. There is no evidence that Respondent disciplined or otherwise discriminated against Complainant at any time during Complainant's extremely brief work relationship with Respondent. Indeed, there is no evidence that Respondent did anything to bring the work relationship between the parties to an end. The record reveals the reason why Complainant was not asked to deliver loads for Respondent after November 30, 2015 is because – and is *only* because – Complainant did not have an operable tractor after that date. When the drive shaft fell out of Complainant's tractor on November 30, Complainant was then in material breach of the Independent Contractor Operating Agreement, which, at a minimum, required Complainant to have an operating tractor. There is no evidence that Respondent was motivated by any improper purpose when it ended the work relationship with Complainant. Complainant has failed to prove by a preponderance of evidence that he suffered an adverse employment action.[35]

FINDINGS OF FACT AND CONCLUSIONS OF LAW[36]

I make the following Findings of Fact and Conclusions of Law:

1. While acting as an independent contractor for Respondent, Johnson operated a "commercial motor vehicle" as defined in 49 U.S.C. §31101(1).

2. Respondent is an "employer" as defined in 49 USC §31101(3).

3. Respondent is also a "person" as defined in 49 CFR §1978.101(k).

4. At all relevant times, Respondent was subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105.

5. Complainant has not worked for Respondent at any time after November 30, 2015.

6. Complainant filed a timely complaint against Respondent with Occupational Safety and Health Administration of the United States Department of Labor.

7. OSHA dismissed Complainant's complaint.

[35] Any claim Complainant may have that he was not properly paid for his labors belongs in another forum.
[36] The ARB has recently expressed a preference for ALJs including a "tightly focused findings of fact section" in our decisions. *Austin v. BNSF Railway Company*, ALJ No. 2016-FRS-13, ARB Case 2017-24 (ARB March 11, 2019) slip op. at 2, n3.

8. Complainant submitted a timely request for hearing to the Office of Administrative Law Judges of the Department of Labor.

9. Complainant has not proven by a preponderance of evidence that he engaged in protected activity.

10. Complainant has not proven by a preponderance of evidence that he suffered an adverse employment action.

ORDER

Complainant's claim is hereby **DENIED**.

Steven D. Bell
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).