In the Matter of:

DANNY P. LEROY, **ARB CASE NO. 07-056**

COMPLAINANT, **ALJ CASE NOS. 2006-AIR-003, -024**

v. **DATE: March 31, 2009**

KEYSTONE HELICOPTER, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Scott M. Pollins, Esq., Ardmore, Pennsylvania

For the Respondent:
John A. Adams, Esq., *Susanin, Widman & Brennan, P.C.*, King of Prussia, Pennsylvania

FINAL DECISION AND ORDER

Danny P. LeRoy complained that Keystone Helicopter, Inc., violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) and its implementing regulations[1] when Keystone terminated his employment after he raised concerns about air safety issues. After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) dismissed LeRoy's complaint. We affirm.

[1] 49 U.S.C.A. § 42121 (West 2008). Regulations implementing AIR21 appear at 29 C.F.R. Part 1979 (2006).

BACKGROUND

LeRoy worked for Keystone from October 11, 2004 to March 24, 2005, and from May 17 until May 25, 2005, installing conversion packages and repairing helicopters at its depot in West Chester, Pennsylvania.[2] On May 17, 2005, LeRoy's supervisor, Angel Estrada, asked him to patch two main driveshaft housing panels on a Sikorski helicopter.[3] LeRoy stated that he went to another supervisor who told him that he had to rewrap the panels with fiberglass and vacuum-bag both panels because that was the better way to do the repair.[4]

LeRoy began the job and Estrada later questioned him about why he was making the repair more complicated. LeRoy testified that Estrada said that Keystone had under-bid the work at only five hours and told him not to ask the other supervisor for advice again because he "overkills" everything.[5] Keystone terminated LeRoy's employment on May 25, 2005, because of poor attendance and overlong production times.[6]

LeRoy timely filed a whistleblower complaint on July 24, 2005, with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that Keystone fired him because he raised air safety concerns in repairing driveshaft panels on May 17, 2005. OSHA dismissed his complaint on November 2, 2005, on the grounds that LeRoy had not engaged in activities that AIR 21 protects.

LeRoy objected to OSHA's finding and timely requested a hearing, which was initially set for January 5, 2006.[7] The ALJ postponed the hearing twice to consider Keystone's motion for summary judgment.[8] After oral argument and briefing, the ALJ denied the motion on June 1, 2006.[9] The ALJ held a hearing on July 19 and 21, 2006,

---

2 Complainant's Exhibit (CX) 2; Transcript (TR) at 86, 226, 302.

3 Respondent's Exhibit (RX) 13 at 88-96; TR at 200.

4 TR at 63-65, 206-10, 350-51.

5 RX 13 at 94-95; TR at 206-10.

6 TR at 113-17, 127-29, 150-60, 330-33.

7 ALJ Exhibit (ALJX) 1-2.

8 ALJX 3-6.

9 ALJX 7-8.

closed the record on September 7, and set a September 25, 2006 deadline for the parties to file briefs simultaneously.[10]

Meanwhile, LeRoy had filed a second complaint on May 11, 2006, alleging that Keystone had blacklisted him in retaliation for filing his first complaint.[11] OSHA dismissed the second complaint and LeRoy requested a hearing.[12] The ALJ consolidated the two complaints and held a hearing on the second complaint on October 11, 2006.

On December 4, 2006, the ALJ issued an Order noting that Keystone, in its post-hearing brief on the first complaint, had raised the issue of whether it was a covered employer under AIR 21. Keystone argued that LeRoy had failed to establish coverage, an essential element of his complaint, and therefore the complaint must be dismissed.[13] The ALJ granted LeRoy's counsel 15 days to brief the issue of coverage.

In his response to the ALJ, LeRoy argued that Keystone had waived the issue of coverage, pursuant to the Supreme Court's *Arbaugh v. Y&H Corp.* ruling[14] In *Arbaugh*, the Court held that the employee numerosity requirement under Title VII[15] is an element of the plaintiff's claim for relief, not a jurisdictional issue.[16] Thus, when an employer seeks to defend against a Title VII claim on the basis that it is not covered, that is, does not employ 15 or more persons, it must do so by pleading or filing a motion to dismiss under FRCP 12(b)(6), failure to state a claim, not by pleading or moving to dismiss under FRCP 12(b)(1), lack of subject matter jurisdiction.[17] A 12(b)(6) motion must be filed no later than the conclusion of the trial on the merits.[18] LeRoy argued that since Keystone had not raised the coverage issue at the first hearing, it had waived the argument that it was not a covered employer. The ALJ found LeRoy's reliance on *Arbaugh* misplaced

---

[10] Keystone objected to the ALJ's order that the post-hearing briefs be filed simultaneously because such a filing deprived Keystone of an opportunity to respond to the Complainant's arguments.

[11] ALJX 1.

[12] ALJX 1.

[13] Respondent's Post-hearing Brief at 11-13.

[14] 546 U.S. 500 (2006); Complainant's Brief on Coverage at 2-3.

[15] 42 U.S.C.A. § 2000e(b).

[16] 546 U.S. at 504, 516.

[17] *Id.* at 506-507, 510-511.

[18] FRCP 12(h)(2).

because Keystone had not conceded coverage under AIR 21, and LeRoy's complaints had not gone to judgment.[19]

LeRoy also argued that even if Keystone had not waived coverage, it was an employer under AIR 21 because the company by its own admission adhered to the highest standards of quality, safety, and FAR (Federal Aviation Regulations) compliance.[20] Further, Keystone's facility was a certified Federal Aviation Administration (FAA) repair station, which performed safety-sensitive functions by contract with air carriers.[21] The ALJ rejected this argument and concluded that Keystone's compliance with FAA regulations did not establish it as an air carrier subject to AIR 21.[22]

Third, LeRoy argued that air commerce should be broadly construed and OSHA itself had found Keystone to be a commercial airline company in dismissing LeRoy's complaints.[23] The ALJ rejected this argument on the grounds that OSHA's findings were not binding on him.[24]

Finally, LeRoy asked the ALJ to re-open the record to receive additional evidence and permit him to amend his complaint to allege specifically that AIR 21 covered Keystone if the ALJ did not accept his *Arbaugh* argument.[25] The ALJ rejected this latter request because coverage was not jurisdictional and therefore no amendment was necessary. The ALJ also rejected re-opening the record on the grounds that LeRoy had failed to show that the evidence to be submitted was new and material and not readily available prior to the close of the record.[26] LeRoy appealed the ALJ's Recommended Decision and Order (R. D. & O.) to us.

---

19 Recommended Decision and Order (R. D. & O.) at 2-3.

20 Complainant's Brief on Coverage at 3-4. *See* RX 7, CX 4, 13.

21 Complainant's Brief on Coverage at 4.

22 R. D. & O. at 3.

23 Complainant's Brief on Coverage at 3-4. LeRoy cited *Arkin v. Trans. Intern. Airlines, Inc.*, 568 F. Supp. 11 (E.D.N.Y. 1982) as an example of such broad coverage. That case held that travel agents, tour operators, and nominal social clubs that sell tours and air transportation are "indirect air carriers" within the purview of the FAA, but did not address coverage under AIR 21.

24 R. D. & O. at 3.

25 Complainant's Brief on Coverage at 5-8.

26 R. D. & O. at 4. *See* 29 C.F.R. § 18.54(c) (2008).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.[27] In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.[28] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[29] Thus, if substantial evidence in the record supports the ALJ's findings of fact, they shall be conclusive.[30] The ARB reviews the ALJ's legal conclusions de novo.[31]

DISCUSSION

We consider whether Keystone waived the issue of coverage, whether the ALJ properly excluded evidence of coverage, and whether LeRoy proved that Keystone is an employer that AIR 21 covers.

The Legal Standard

AIR 21 prohibits an air carrier, or contractor or subcontractor of an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided an employer or the federal government information relating to any violation or alleged violation of any FAA order, regulation, or standard or any other provision of federal law related to air carrier safety.[32]

---

[27] *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

[28] 29 C.F.R. § 1979.110(b).

[29] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

[30] *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

[31] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

[32] 49 U.S.C.A. § 42121(a).

The FAA defines an air carrier as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[33] Air transportation means "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft."[34] Interstate air transportation means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft between states and territories when any part of the transportation is by aircraft.[35] Contractor means a company that performs safety sensitive functions by contract for an air carrier.[36] To prevail in an AIR 21 case, a complainant like LeRoy must prove by a preponderance of the evidence that his employer is subject to the employee protection provisions of AIR 21, namely, that the employer is an air carrier or contractor or subcontractor of an air carrier.[37] LeRoy must also show that (1) he engaged in protected activity; (2) his covered employer knew that he engaged in the protected activity; (3) he suffered an adverse personnel action; and (4) the protected activity was a contributing factor in the adverse action. LeRoy's failure to demonstrate any of these essential elements must result in the dismissal of his complaints.[38]

Analysis

On appeal, the only issue before us is LeRoy's contention that the ALJ erred in failing to find that Keystone waived its argument that it was not a covered employer.[39] LeRoy quarrels with the ALJ's finding that Keystone raised the issue prior to judgment. LeRoy asserts that under *Arbaugh*, the issue of coverage must be raised prior to the conclusion of a trial on the merits and not after a trial but before judgment.[40]

---

[33] 49 U.S.C.A. § 40102(a)(2).

[34] 49 U.S.C.A. § 40102(a)(5).

[35] 49 U.S.C.A. s 40102(a)(25).

[36] 49 U.S.C.A. § 42121(e).

[37] *See* 49 U.S.C.A. § 42121(a), (b); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining "scope of coverage, procedures, and burdens of proof under AIR 21").

[38] *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 11 (ARB Feb. 29, 2008).

[39] Complainant's ARB Brief at 2-3. LeRoy's counsel stated that he would not brief the remaining issues listed in his Petition for Review and did not expect the ARB to rule on those issues.

[40] Complainant's ARB Brief at 3-7.

Keystone raised the coverage issue in its September 25, 2006 brief to the ALJ after the July hearing on LeRoy's initial complaint. The ALJ closed the record but did not issue a decision because LeRoy had filed a second complaint that the ALJ had consolidated with his first.[41] At the hearing on his second complaint, LeRoy adduced no evidence relating to whether Keystone was covered under AIR 21. Before the ALJ decided the cases, LeRoy submitted a brief on the issue of coverage, contending that Keystone had waived its coverage argument.[42] The ALJ issued his recommended decision on the consolidated complaints on January 4, 2007.[43] He rejected LeRoy's argument that under *Arbaugh*, Keystone had waived a defense that it was not a covered AIR 21 employer because it had raised the coverage issue after the hearing. Leroy argues that this constitutes legal error.

We, too, reject LeRoy's waiver argument. As noted earlier, in *Arbaugh* the employer filed a motion to dismiss for lack of subject matter jurisdiction two weeks after the trial court entered judgment on the jury verdict, arguing that it did not employ 15 or more persons and therefore was not an employer under Title VII. The Court held that the 15-or-more employee requirement was not jurisdictional. Thus, an employer asserting the coverage defense must do so via a 12(b)(6) pleading or motion before the conclusion of the trial, not by a 12(b)(1) subject matter jurisdiction pleading or motion, which can be filed whenever it appears that the court lacks jurisdiction.[44]

But here, Keystone did not file a motion to dismiss. Instead, in a post-hearing brief it argued to the ALJ that LeRoy had not adduced sufficient evidence, that is, proved by a preponderance, that it was an AIR 21 covered employer. LeRoy would have us construe *Arbaugh*, as applied to AIR 21, to mean that an employer waives the right to argue to the ALJ after an evidentiary hearing that the complainant did not sufficiently prove an essential element of his claim, i.e., that the employer is an air carrier, or contractor, or subcontractor of an air carrier. Because *Arbaugh* does not stand for such a proposition, LeRoy's waiver argument fails.

We turn to LeRoy's request that the ALJ re-open the record.[45] Citing the regulation pertaining to reopening the record, the ALJ determined that to permit LeRoy to

---

41 October 11, 2006 TR at 3.

42 Complainant's Brief on Coverage at 2-3.

43 At the second hearing, Keystone moved to dismiss LeRoy's complaint for failure to state a cause of action on which relief could be granted and later sought a directed verdict on the blacklisting issue; however, it did not raise the coverage issue. October 11, 2006 TR at 9-11, 95, 105.

44 See FRCP 12(h)(2), (3).

45 LeRoy did not argue on appeal to us the ALJ's denial of his motion to reopen the record. Usually, the ARB will consider waived arguments that are made before the ALJ but

present new evidence would unduly prejudice Keystone, and that LeRoy had failed to show that the evidence was new and material and not available prior to the closing of the record.[46]

The ALJ properly denied LeRoy's request. The proffered evidence consists of Keystone's sales brochures and internet articles about the company, materials that are on their face readily available to the general public as well as to litigants. Moreover, LeRoy's counsel made no showing that these documents were new or unavailable prior to either hearing on the merits. Therefore, since the ALJ complied with the requirement of the relevant rule, we find no abuse of discretion in the ALJ's refusal to re-open the record.[47]

Finally, LeRoy argued to the ALJ, but not to us, that the record contains evidence showing that Keystone is covered under AIR 21. LeRoy relies on the findings of OSHA, in its letters dismissing his complaints, that complainant and respondent are both covered under one or more provisions of AIR 21, and that Keystone "is a commercial airline company who [sic] transports passengers or cargo."[48] We reject this argument because OSHA's findings are not binding on the ALJ, who conducts a de novo hearing on the merits.[49]

LeRoy points to no other evidence showing that Keystone is an air carrier or a contractor of an air carrier. None of the ten witnesses that the parties called testified about Keystone's business. Nothing in the record shows that Keystone engages in the air transportation of passengers for compensation or contracts with air carriers to do so. While helicopter repair is undoubtedly a safety sensitive function, the record contains no

---

not on appeal. *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 9 (ARB Mar. 30, 2007); *Hall v. United States Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-005, slip op. at 6 (ARB Dec. 30, 2004) (failure to present argument or pertinent authority waives argument). We address these arguments briefly to emphasize that coverage under AIR 21 is an essential element of a complainant's case.

[46] R. D. & O. at 4. *See* 29 C.F.R. § 18.54(c) ("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.").

[47] *Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-026, slip op. at 6 (ARB July 22, 2008).

[48] ALJX 1 (Nov. 2, 2005 and Sept. 6, 2006 OSHA letters).

[49] 29 C.F.R. § 24.107(b) (hearing will be conducted de novo on the record). *See Powers v. PACE*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 7 (ARB Order Dec. 21, 2007) (ALJ erred in relying on OSHA's findings to dismiss respondents).

evidence that Keystone's repair contracts on which LeRoy worked were made with air carriers. Therefore, substantial evidence supports the ALJ's conclusion that LeRoy failed to establish an essential element of his claim.

CONCLUSION

The ALJ did not err as a matter of law when he concluded that Keystone did not waive the coverage issue. Nor did the ALJ abuse his discretion in denying LeRoy's motion to reopen the record. Finally, substantial evidence in the record as a whole supports the ALJ's finding that LeRoy did not prove by a preponderance of the evidence that Keystone was an employer subject to the employee protection provisions of AIR 21.

For these reasons we accept the ALJ's recommended decision and **DISMISS** LeRoy's complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge