



In the Matter of:

GLENN T. FERGUSON,

ARB CASE NO. 04-057

COMPLAINANT,

ALJ CASE NO. 2002-STA-27

v.

DATE: June 29, 2005

**BOMAC LUBRICANT TECHNOLOGIES,
INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Glenn T. Ferguson filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Bomac Lubricant Technologies, Inc., had terminated his employment in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA).¹ OSHA found no STAA violation, and the case was referred to an Administrative Law Judge (ALJ) for an administrative adjudication. The question before the Administrative Review Board is whether the Board should accept the ALJ's

¹ 49 U.S.C.A § 31105 (West 1997). The employee protection provisions of the STAA prohibit employment discrimination against any employee for engaging in protected activity, including filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B).

recommendation that Ferguson's complaint be dismissed as abandoned given that Ferguson failed to maintain contact with his counsel and failed to respond to the ALJ's order to show cause why the case should not be dismissed. We agree with the ALJ that because Ferguson failed to respond to his counsel's attempts to contact him and filed no response to the ALJ's show cause order, he has abandoned his case and we must dismiss his complaint.

BACKGROUND

Upon referral of Ferguson's case to the Department of Labor's Office of Administrative Law Judges, the assigned ALJ scheduled a hearing on the complaint but continued the hearing in light of Bomac's bankruptcy. On July 9, 2003, the ALJ issued an order directing the parties to provide him with a status report. Bomac responded:

Pursuant to an order of the United States Bankruptcy Court dated March 28, 2003, all of the operating assets of the Respondent were sold on or about April 29, 2003. Since that date, the Respondent has not conducted business. The Respondent is informed and believes that all of the proceeds from the sale of the Respondent's assets have been used or will be used to pay secured creditors and administrative expenses in the bankruptcy case. Therefore, the Respondent is further informed and believes that there will be no distribution to unsecured creditors, including the Complainant, in this case.²

On September 9, 2003, Ferguson's counsel notified the ALJ that he had been unable to contact Ferguson. On October 9, 2003, the ALJ issued an order to show cause why the complaint should not be dismissed. The ALJ noted that he had directed the parties to provide a case status report by August 1, 2003, but that only Bomac complied with the order. He also noted that Ferguson's counsel indicated that he had been unable to contact Ferguson. Accordingly, the ALJ stated that Ferguson had until October 31, 2003, to inform the ALJ, his counsel and Bomac's counsel of "his intentions to pursue this matter."³ The ALJ further informed Ferguson that if Ferguson did not respond to the order, he would "entertain a motion to dismiss the complaint."⁴

² Respondent's Status Report at 1.

³ Order to Show Cause Why the Complaint Should Not Be Dismissed at 1.

⁴ *Id.*

Ferguson failed to contact his counsel and he filed no reply to the ALJ's Order to Show Cause. Therefore on January 29, 2004, the ALJ issued a Recommended Order of Dismissal (R. O. D.).

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations.⁵ This case is before the Board pursuant to the STAA's automatic review provisions.⁶ The ARB is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."⁷ The Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.⁸ But the Board reviews questions of law de novo.⁹

On February 19, 2004, the Board issued a Notice of Review and Briefing Schedule informing Ferguson of his right to file a brief in opposition to the ALJ's R. O. D. Ferguson acknowledged receiving the Board's Notice on March 8, 2005, by signing the Domestic Return Receipt. Nevertheless, Ferguson failed to file a brief in opposition to the ALJ's R. O. D.

DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution.¹⁰ This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."¹¹ Like the courts, the Department of Labor's

⁵ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. Part § 1978 (2004).

⁶ "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a).

⁷ 29 C.F.R. § 1978.109(c)(1).

⁸ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998).

⁹ *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

¹⁰ *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962).

¹¹ *Id.* at 630-631.

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.¹²

Substantial evidence in the record and well-established legal precedent support the ALJ’s conclusion that Ferguson has abandoned his case. Ferguson failed to maintain contact with his counsel and failed to respond to the ALJ’s show cause order even after the ALJ explained in his order the consequences of Ferguson’s failure to respond.

That Ferguson has chosen to abandon his case is further supported by his failure to take advantage of his opportunity before the Board to explain why the ALJ’s finding that he abandoned his case should be reversed. Accordingly, the Board **ACCEPTS** the ALJ’s Recommended Order of Dismissal and **DISMISSES** Ferguson’s complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹² *Kruml v. Patriot Express*, ARB 03-015, ALJ No. 02-STA-7, slip op. at 4-5 (ARB Feb. 25, 2004); *Assistant Sec’y for OSH and Reichelderfer v. Bridge Transp., Inc.*, ARB No. 02-068, ALJ No. 2001-STA-041, slip op. at 3 (ARB Aug. 29, 2003); *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 4 (ARB Mar. 15, 2002); *Curley v. Grand Rapids Iron & Metal Co.*, ARB No. 00-013, ALJ No. 99-STA-39, slip op. at 2 (ARB Feb. 9, 1999).