In the Matter of:

SCOTT DENDY,

COMPLAINANT,

v.

HAR-CON CONSTRUCTION CORPORATION,

RESPONDENT.

ARB CASE NO. 05-121

ALJ CASE NO. 2005-STA-16

DATE: July 31, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael D. Oeser, Esq., *Adair & Myers, P.L.L.C.*, Houston, Texas

For the Respondent:
Joseph L. Wood, Esq., *Alaniz and Schraeder, L.L.P.*, Houston, Texas

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 2006). On April 15, 2005, Respondent Har-Con Construction Corporation submitted a Motion for Summary Judgment to an Administrative Law Judge (ALJ) requesting that Scott Dendy's case be dismissed. On June 28, 2005, the ALJ issued a Recommended Decision and Order Granting Summary Decision (R. D. & O.), which is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2006). For the following reasons we remand the case to the ALJ.

PROCEDURAL BACKGROUND

On October 19, 2004, Dendy spoke to Charles Clack, an investigator at the Occupational Safety and Health Administration (OSHA). According to OSHA, Dendy "alleged that he was forced to drive a commercial vehicle without a Commercial Driver's License (CDL), and that the truck has no brakes and lights do not work."[1] OSHA contacted Har-Con by letter, dated October 20, 2004, to inform the company of Dendy's allegations. On October 27, 2004, Har-Con submitted a letter to OSHA "reject[ing] all complaints alleged by Mr. Scott Dendy."[2]

OSHA conducted an investigation and on January 4, 2005, issued a determination letter indicating that "[t]he complaint was investigated and determined to have no merit."[3] On January 28, 2005, the ALJ received a handwritten note from Dendy indicating his intent to appeal OSHA's determination. On February 2, 2005, the ALJ issued a Notice of Hearing and Pre-Hearing Order scheduling a hearing for March 7, 2005, and establishing procedures for pleadings and discovery.

On February 18, 2005, Har-Con submitted a letter to the ALJ rejecting "all complaints alleged by Mr. Scott Dendy" and indicating that it had not received any pleadings. The ALJ issued a letter to Dendy on February 25, 2005, directing him to submit a formal complaint and suggesting he obtain counsel to represent him at the hearing. On February 28, 2005, the ALJ received a handwritten note from Dendy requesting an extension in order to obtain counsel. Har-Con objected to postponement. On March 2, 2005, the ALJ issued an Order rescheduling the hearing to April 26, 2005, and scheduling "[a] telephone pre-hearing conference … with the parties to discuss any motions, stipulations and/or objections."[4] This Order also instructed Dendy to "file with the undersigned Administrative Law Judge and serve upon the Respondent a Complaint

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[1] OSHA Determination, Report of Screening at 2.

[2] "On July 14, 2003 when Scott Dendy was hired as a Har-Con delivery and truck driver, it was on a temporary basis. He was told at the time we had an occasional use for a CDL licensed driver to move heavy equipment. Even though we had a skilled construction worker who currently held his CDL license, Scott was told repeatedly it would be beneficial to him if he applied for his license. He never did … Scott is currently on Workers Compensation since he claims he hurt his shoulder when the tire blew-out. He has been instructed to report back to Mr. Reo when he receives a Doctor's Release."

[3] OSHA Determination at 1 ("Respondent alleges that Mr. Dendy has not been discharged, but rather is off work because there is no light duty work involved in their operation to assign him to. The evidence also indicates that he must acquire a CDL before he can return to work in accordance with the [Texas Department of Public Safety] requirement.").

[4] Order Rescheduling Hearing and Revised Pre-Hearing Order at 3.

alleging the nature of his protected activities, each and every violation against Respondent claimed, as well as the relief sought."[5]

On March 21, 2005, Dendy submitted a letter to the ALJ stating: "I should not be involved in this situation to begin with, because I never filed a complaint. Mr. Clack took it upon himself to contact my work without my knowledge or request to do so. I called to get help so I would not have to drive an illegal rig." Har-Con submitted a letter to the ALJ on March 28, 2005, contending that the March 21, 2005 letter did not constitute a complaint.[6] Har-Con thereafter submitted its First Set of Interrogatories, First Request for Production, an "Answer to Scott Dendy's Complaint," and its Pre-Hearing Submission identifying witnesses and documents to be introduced at the hearing.

On April 15, 2005, Har-Con submitted its Motion for Summary Judgment (Motion). The Motion included the following attachments: (1) an October 20, 2004 letter from OSHA to Doug Reo, Vice-President of Har-Con, serving notice that Dendy filed a complaint pursuant to the STAA; (2) Affidavits of Harry E. Conley, Chairman of Har-Con; Eric Booth, Purchasing Agent for Har-Con; and Douglas E. Reo, President of Har-Con, all attesting that Dendy is on "Workers Compensation Leave" and "[h]is employment with Har-Con has not been terminated;" (3) a copy of the March 21, 2005 letter Dendy submitted to OSHA; (4) Har-Con's First Set of Interrogatories; (5) Har-Con's Notice of Oral Deposition of Scott Dendy; and (6) an April 13, 2005 Certificate of Non-Appearance.[7] On the same day Har-Con submitted its Motion, the ALJ issued an Order to Show Cause giving Dendy one week to respond to the Motion and indicating that "[t]his matter will be decided based upon the written submissions of the parties."[8]

The ALJ conducted the telephone conference on the Order to Show Cause as scheduled on April 22, 2005. During the conference Dendy indicated that his employer-provided medical and dental insurance benefits had been cut off and he believed that his employment had been terminated.[9] Counsel for Har-Con responded by indicating that

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[5] Order at 2.

[6] "The facsimile that you received from Mr. Dendy does not appear to be a formal complaint … out of an abundance of caution, we would request that you provide some guidance to us on whether you and the Department of labor [sic] will be treating the handwritten facsimile which you received as a complaint to which we must file an answer by our deadline of Monday, April 4, 2005."

[7] The Certificate states that "[o]n April 5, 2005 … Har-Con … forwarded to the Plaintiff, Scott Dendy, at his last know address … Respondent's Notice of Oral Deposition … that was noticed for today, Monday, April 11, 2005 at 2:00 p.m. …. It is 2:30 p.m. on the 11th; Mr. Dendy has not shown up."

[8] April 15, 2005 Order to Show Cause at 2.

[9] *See* Transcript of Telephone Conference (Tr.) at 4-5:

Dendy had not been fired but his benefits may have ceased because he is on an "extended absence."[10] Following the conference call, the ALJ issued an Order Postponing Hearing and Extending Time to Respond to Order to Show Cause.[11]

> JUDGE ROMERO: … The affidavits that are attached to the motion seem to indicate to me that you were not terminated from your employment, that you were on, that you're still on workman's compensation apparently. Are you still receiving work comp benefits?
> MR. DENDY: Yes, sir, I am, but I have been told by three or two - or three employees that I no longer have a job there and my benefits, and all my benefits have been dropped.
> JUDGE ROMERO: Well, who are the employees? Who are the employees? Are they managers or supervisors?
> MR. DENDY: Um, one of them is my supervisor which was Eric Booth. Um then I spoke with Manuel. A friend of mine called over to my work over and spoke with Manuel Flores and he told them that I was fired and no longer worked there and one of the ladies that works there is a very, very good friend of mine. We've known each other forever. I lived with the lady. I was at her house during the Christmas holidays and on New Year's Eve, I think it was New Year's, before New Year's Day, yeah, she told me that - we were all out there hanging out and talking and she told me I no longer have a job with Har-Con.
> JUDGE ROMERO: Well, have you ever talked to any managers at Har-Con?
> MR. DENDY: Well, I spoke with Mr. Rio. He told me, never said I had a job with them. He told me just to get in touch with them and Workman's Comp released me. But they have dropped my medical insurance. They dropped my dental insurance and they will not talk to me. I call over there. They will not talk to me on the phone anymore so apparently, um, I don't have a job with them anymore and I've been told so by three different people.
> JUDGE ROMERO: Okay. Well, that certainly may be an issue then.

[10] *Id.* at 8:

> JUDGE ROMERO: Is he still on the payroll?
> MR. WOOD: He is - he has not been discharged. His benefits may have ceased, but that's simply because of the fact that being on workers' compensation leave, that happens to any employee who is on extended absences such as Mr. Dendy.

On May 5, 2005, the ALJ received a letter from Michael D. Oeser indicating that he would be representing Dendy and requesting an extension of time to respond to the Show Cause Order. That same day the ALJ issued an Order Enrolling Counsel and Extending Time to Respond to Order to Show Cause.[12]

On June 9, 2005, counsel for Dendy submitted his response to Har-Con's Motion. The response consisted of: (1) a Brief in Response to Respondent's Motion for Summary Judgment and Court's Order to Show Cause; (2) copies of pages from his "Daily Truck Trip Log;" (3) copies of documents from the Texas Department of Public Safety; (4) "witness statements" from three individuals not employed by Har-Con attesting that they heard from Har-Con employees that Dendy no longer has a job at Har-Con; and (5) Affidavit of Scott E. Dendy (Dendy Affidavit). On June 13, 2006, Har-Con submitted its Reply to Complainant's Brief in Response to Respondent's Motion for Summary Judgment and Court's Order to Show Cause, reiterating the arguments its first brief and contending that the witness statements constitute inadmissible hearsay.

On June 28, 2005, the ALJ issued an R. D. & O. granting Har-Con's Motion. The ALJ stated that Dendy "apparently continues in his workers' compensation leave status" and "produced only hearsay statements from third-party witnesses who have been purportedly informed by others, who have no authority to implement adverse employment action, that Complainant no longer has a job with Respondent."[13] The ALJ went on to conclude that Dendy "has not established that he has suffered adverse employment action, much less discriminatory action."[14]

This case is now before the Board under the automatic review provisions of the STAA.[15] We issued a Notice of Review and Briefing Schedule on July 5, 2005. Both parties filed briefs.

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[11] "For reasons discussed in the conference call, and since it appears that Respondent's motion has some validity and to conserve judicial resources, the hearing in this matter scheduled for April 26, 2005 is hereby postponed to a later date, if necessary, to allow Complainant additional time to respond to respondent's Motion for Summary Judgment."

[12] "It is hereby ordered that Complainant show cause by June 9, 2005, why Respondent's Motion for Summary Judgment should not be granted…"

[13] R. D. & O. at 3-4.

[14] *Id*. at 4.

[15] 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C), Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), and 29 C.F.R. § 1978.109(c)(1). We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, which is prescribed in 29 C.F.R. §§ 18.40 and 18.41 (2006), also governs our review. Accordingly, we may[16] grant summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact" and the moving party "is entitled to summary decision as a matter of law."[17] To defeat the motion for summary decision, the nonmoving party "may not rest upon the mere allegations or denials of such pleading" but "must set forth specific facts showing that there is a genuine issue of fact for the hearing."[18]

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain

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[16] *See* 29 C.F.R. § 18.41:

> (a) No genuine issue of material fact. (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions.
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> (2) An initial decision and a final decision made under this paragraph shall include a statement of:
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> (i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and
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> (ii) Any terms and conditions of the rule or order.
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> (3) A copy of any initial decision and final decision under this paragraph shall be served on each party.
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> (b) Hearings on issue of fact. Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

[17] *See* 29 C.F.R. § 18.40(d); *see, e.g.*, *Agee v. ABF Freight Systems, Inc*., ARB No. 04-182, ALJ No. 04-STA-40 (ARB Dec. 29, 2005).

[18] 29 C.F.R. § 18.40(c).

protected activities.[19] These protected activities include making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order."[20]

Although Dendy must ultimately prove by a preponderance of the evidence that Har-Con disciplined, discharged, or discriminated against him for engaging in protected activity, he need not do so at this stage of his case.[21] The sole issue before the Board is whether to grant Har-Con's Motion seeking summary decision.

Har-Con contends that it is entitled to summary decision because (1) Dendy "has suffered no adverse employment action;" (2) "Har-Con was never aware of any protected activity;" and (3) "Dendy does not wish for this matter to proceed any further."[22] In his response to the Motion, Dendy contends that (1) his employment has been terminated and his benefits have ceased; (2) he made safety complaints to Har-Con managers about safety issues, including driving trailers without brakes; and (3) he attempted to retract his complaint out of fear of losing his job.[23]

Although we review the arguments and supporting documents presented by each party, our only task is to decide whether Har-Con has shown that there is no genuine issue as to any material fact and that it is entitled to summary decision as a matter of law. After careful consideration, we conclude that we cannot dismiss Dendy's case for the reasons presented in Har-Con's Motion.

A. A Genuine Issue of Material Fact Exists as to Whether Har-Con Subjected Dendy to Adverse Action

Har-Con argues that Dendy's complaint should be dismissed because he "has suffered no adverse employment action. He was never fired, demoted, or even written up for any alleged refusal to drive."[24] In support of this argument, Har-Con submitted the

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19 49 U.S.C.A. § 31105(a)(1).

20 49 U.S.C.A. § 31105(a)(1)(A).

21 Dendy represented himself before the ALJ until May 5, 2005. We construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), citing *Hughes v. Rowe*, 449 U.S. 5 (1980). At the same time, we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." *Id.*

22 Motion at 3-4.

23 Complainant's Brief in Response to Respondent's Motion at 7-11.

24 Motion at 3.

affidavits of Conley, Booth, and Reo. In response, Dendy submitted three witness statements to support his contention that his employment has been terminated, as well as his own affidavit contending that his employment has been terminated and his benefits have ceased.

We need not address the issue of whether Dendy is still employed by Har-Con because Har-Con may have subjected Dendy to adverse action by ending his medical and dental benefits.[25] Dendy stated during the telephone conference that "they have dropped my medical insurance. They dropped my dental insurance and they will not talk to me."[26] He also contends that Mason refused to talk to him about his medical insurance, and that Reo did not return his phone calls inquiring about the status of his medical insurance.[27]

Har-Con admitted during the telephone conference that Dendy's benefits "may have ceased,"[28] but now contends, citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997), that only "ultimate employment decisions" qualify as adverse actions.[29] However, *Mattern* also indicates that "'[u]ltimate employment decisions' include acts 'such as … granting leave … promoting, and compensating.'" *Id.* at 707, citing *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir.1995). Dendy's medical and dental benefits constitute a form of compensation.[30] Additionally, since *Mattern*, the Fifth Circuit has acknowledged that a "reduction in pay or benefits" could constitute an adverse employment action.[31] Har-Con therefore has not shown that the there is no issue of material fact with respect to the issue of adverse action.

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[25] Because we do not address the issue of discharge, we will not discuss the admissibility of the witness statements.

[26] *Id.* at 5.

[27] Brief in Response to Respondent's Motion at 5-6; Dendy Affidavit at 4.

[28] Tr. 8.

[29] Motion at 3.

[30] *See, e.g., American Federation of State, County and Municipal Employees, Local 380 v. Hot Spring County, Ark.*, 362 F. Supp. 2d 1035, 1039 (W.D. Ark.2004), citing BLACK'S LAW DICTIONARY 277 (7th ed.1999) ("In an employment situation, ['compensation'] includes wages, stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement.").

[31] *See, e.g., Mowbray v. Am. Gen. Life Cos.*, 162 F. App'x 369, 374 (5th Cir. 2006) (grant of summary judgment under Family and Medical Leave Act).

The decision to end Dendy's medical and dental benefits may have also been discriminatory. During the telephone conference, Har-Con contended that Dendy's benefits ceased "because of the fact that being on workers' compensation leave, that happens to any employee who is on extended absences such as Mr. Dendy."[32] However, Har-Con does not provide any support for its suggestion that its decision was not discriminatory. We therefore conclude that Dendy has shown that there is a genuine issue of material fact in dispute as to whether Har-Con subjected him to adverse employment action, and whether that action was discriminatory.[33]

B. A Genuine Issue of Material Fact Exists as to Whether Dendy Engaged in STAA-Protected Activity.

Har-Con also contends that it is entitled to summary decision because it "was never aware of any protected activity" by Dendy.[34] In support of this argument, Har-Con again relies on the affidavits of Conley, Booth and Reo. Dendy responds to Har-Con's contention by stating in his brief and affidavit that he not only made verbal safety complaints to Har-Con, but also recorded safety problems in the daily logs that Dendy alleges were submitted to Booth and reviewed by Reo.[35]

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[32] Tr. 8.

[33] In conjunction with Complainant's Brief in Opposition to the Recommended Decision and Order, Dendy submitted a document dated July 6, 2005, from the Principal Financial Group "providing information on prior dental coverage." The document identifies Scott Dendy as a "Member" and Har-Con as the "group plan holder." It also includes the words "Date Coverage Began: 04-01-2004" and "Last Date Covered: 10-31-2004." Although the document was created after the closing of the record before the ALJ, the information it contains may have been available to Dendy as early as October 31, 2004. When deciding whether to consider new evidence, the Board relies upon the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which provides that "[o]nce 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." 29 C.F.R. § 18.54(c); *see, e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-15 , Order Denying Stay, slip op. 5-6 (ARB June 9, 2006). Although we do not accept the July 6, 2005 document, Har-Con has admitted that Dendy's benefits ceased, thereby rendering this new evidence cumulative for purposes of summary decision.

[34] Motion at 3.

[35] Complainant's Brief in Response to Respondent's Motion at 2-5; Dendy Affidavit at 1-3.

Dendy's burden in opposing Har-Con's Motion is not to prove the facts on which he would bear the ultimate burden at a hearing.[36] His burden at this stage of his case is only to show that there is a genuine issue of material fact in dispute. Dendy has shown that there is a dispute regarding whether he engaged in protected activity. His brief and affidavit set forth specific facts which could support a finding in his favor. We therefore conclude that Har-Con is not entitled to summary decision on this issue.

C. Dendy's Previous Reluctance to Proceed with His Case Does Not Entitle Har-Con to Summary Decision

Finally, Har-Con also contends that it is entitled to summary decision because Dendy failed to respond to discovery requests, failed to attend a deposition, and indicated in his March 21, 2005 letter that "I should not be involved in this situation to begin with, because I never filed a complaint."[37]

Although the March 21, 2005 letter may reflect a previous reluctance to proceed with his case, Dendy did proceed and he has not withdrawn his case. We also note that the ALJ had the authority to impose sanctions for Dendy's procedural failures. The ALJ chose not to do so. Neither the March 21, 2005 letter nor Dendy's procedural failures support Har-Con's contention that there are no genuine issues of material fact in dispute in this case.

We conclude there are genuine issues of material fact in dispute, and Har-Con is not entitled to summary decision on its Motion. In remanding the case, we emphasize that we have reached no conclusion regarding the merits of Dendy's complaint.[38]

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[36] *See, e.g., Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 98-087, ALJ No. 1997-SDW-7, slip op. at 15 (ARB Mar. 30, 2000).

[37] Motion at 4.

[38] *See, e.g., Anderson*, slip op at 15; *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 13 (ARB Nov. 30, 1999).

CONCLUSION

For the foregoing reasons, we decline to adopt the ALJ's recommendation, **DENY** Har-Con's Motion for Summary Judgment, and **REMAND** this case to the ALJ for further proceedings in accordance with this decision.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge