



In the Matter of:

**ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY
AND HEALTH,**

ARB CASE NO. 06-068

ALJ CASE NO. 2005-STA-064

PROSECUTING PARTY,

DATE: December 29, 2006

and

JACK MARZIANO,

COMPLAINANT,

v.

KIDS BUS SERVICE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

**Patricia M. Rodenhauen, Esq., Douglas Weiner, Esq., United States
Department of Labor, New York, New York**

For the Complainant:

Jack Marziano, pro se, Yonkers, New York

For the Respondent:

Michael M. Rabinowitz, Esq., Rabinowitz & Galina, Mineola, New York

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface

Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2006). On March 7, 2006, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order of Default Judgment (R. D. & O.) against Respondent Kids Bus Service, Inc. For the following reasons, we affirm the R. D. & O.

BACKGROUND

Kids Bus employed Jack Marziano as a bus driver. On or about February 3, 2004, Marziano was operating a bus carrying teenaged youths when a disturbance arose inside the bus. Marziano was hit several times on the back of his neck with packed ice. He momentarily passed out. Marziano radioed Kids Bus and indicated that he had become disoriented and was unable to safely operate the bus. He parked the bus on the side of the road because he felt unable to continue driving. Marziano was fired that same day. *See* August 31, 2005 Secretary's Findings at 2-3.

On February 19, 2004, Marziano called the Occupational Safety and Health Administration (OSHA) to initiate a STAA complaint. OSHA generated a Discrimination Case Activity Worksheet containing the following Allegation Summary: "Complainant drives school bus. Complainant was hit by ice from student on bus. Complainant refused to drive bus. Complainant was fired."

OSHA conducted an investigation and on August 31, 2005, issued its findings on behalf of the Secretary of Labor. It determined that Kids Bus was an employer subject to the STAA and Marziano was an employee entitled to STAA protection. Secretary's Findings at 1. OSHA concluded that Kids Bus violated the STAA by discharging Marziano for complaining that he was unable to safely operate his vehicle. *Id.* at 2-3. And, because Kids Bus violated the STAA, OSHA ordered Kids Bus to reinstate Marziano; pay back wages of \$33,227.80, interest of \$1,288.82, and compensatory damages for mental pain and suffering of \$25,000; expunge references to the discharge from Marziano's personnel records; and to post a notice to Kids Bus employees relating to its obligations under the STAA. *Id.* at 3.

Kids Bus objected to the Secretary's Findings and requested a hearing before an ALJ. The assigned ALJ scheduled a hearing for November 21 and 22, 2005. At the request of Kids Bus, the ALJ continued the hearing until January 31 and February 1, 2006.¹ By a letter dated January 19, 2006, counsel for Kids Bus informed the ALJ that it had "ceased operations and [was] no longer in business" and had no assets. Further, counsel advised that Kids Bus would "not appear at the hearing . . . and fully understands the potential impact of a default."

¹ The record indicates that the parties were engaged in settlement discussions prior to the demise of Kids Bus Service. *See* R. D. & O. at 1.

Upon receiving a copy of Kids Bus's January 19, 2006 letter, a senior trial attorney in the regional office of the Solicitor of Labor asked the ALJ "to strike Respondent's [Kids Bus's] objections to the Secretary's Findings and Order dated August 31, 2005 . . . and to 'So Order' these Findings and Order." January 23, 2006 letter from Douglas Weiner.

On January 24, 2006, the ALJ issued an order canceling the January 31 and February 1, 2006 hearing. The order also required that Kids Bus "shall on or before February 14, 2006 show cause why its objections to the Secretary's Findings and Order dated August 31, 2005 should not be stricken and the Findings and Order set forth therein be adopted as the final Order of the Secretary." Kids Bus did not respond to the Order.

On March 7, 2006, the ALJ issued an R. D. & O. that provided: "IT IS HEREBY ORDERED that Respondent's objections to the August 31, 2005 Secretary's Findings and Order are stricken and the August 31, 2005 Secretary's Findings and Order are adopted as the final Order of the Secretary."

The case is now before the Administrative Review Board pursuant to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). We issued a Notice of Review and Briefing Schedule on March 15, 2006. Neither Marziano nor Kids Bus Service elected to file a brief.

However, on April 6, 2006, the Assistant Secretary for Occupational Safety and Health, through a letter from the office of the Solicitor of Labor, requested that the Board affirm the ALJ's order of default judgment and that we "amend the caption in this case to reflect his role as the prosecuting party." April 6, 2006 letter from Mark J. Lerner. The other parties were served and did not express any opposition to the Assistant Secretary's requests. We therefore construe this letter as an unopposed motion to intervene pursuant to 29 C.F.R. § 1978.107(a), and we grant the motion.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the Board. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 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); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). The Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The regulations governing proceedings before an ALJ provide for dismissal of a party's request for a hearing if the party fails to appear for a scheduled hearing without good cause.

Dismissal – Abandonment by Party. A request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear. A default decision, under Sec. 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.

29 C.F.R. § 18.39(b) (2006).

Section § 18.39(b) also provides that a default may be entered against a non-appearing party under § 18.5(b), which reads:

Default. Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the administrative law judge to find the facts as alleged in the complaint and to enter an initial or final decision containing such findings, appropriate conclusions, and order.

29 C.F.R. § 18.5(b).

Thus, when a respondent who has objected to OSHA's findings and requested a hearing before an ALJ fails to appear at the hearing or otherwise abandons its request for a hearing without good cause, the ALJ may dismiss the request for a hearing, and impliedly the objection to OSHA's findings. *See* 29 C.F.R. § 18.39(b). If the non-appearing party is the respondent, the ALJ may take the allegations in the complainant's

complaint as admitted and render a decision and order with findings and appropriate conclusions. 29 C.F.R. § 18.5(b).

In the case before us, Kids Bus objected to OSHA's Findings and requested a hearing before an ALJ. After the ALJ continued the hearing once, counsel for Kids Bus told the ALJ that Kids Bus was out of business, had no assets, would not appear at the rescheduled hearing, and "fully underst[ood] the potential impact of a default." The Solicitor of Labor's regional office requested that the ALJ "strike," i.e., dismiss, Kids Bus's objections to OSHA's findings and order and to "So Order" those Findings and Order. We construe that as a request for the ALJ to order that OSHA's findings and order become the final decision of the Secretary of Labor.

The ALJ cancelled the hearing and ordered Kids Bus to show cause why its objections to the Secretary's, i.e., OSHA's, findings and order should not be stricken and the findings and order not be adopted by the ALJ as the final order of the Secretary. *See* § 18.39(b) When Kids Bus did not respond to the order to show cause, the ALJ ordered that Kids Bus's objections to the Secretary's (OSHA's) findings and order be stricken that that those findings and order be adopted as the final order. R. D. & O. at 2. *See* § 18.5(b)

The procedures the ALJ followed satisfy the requirements of the regulations. When Kids Bus abandoned its request for a hearing, it faced dismissal of its objection to OSHA's findings and rulings. The ALJ issued a show cause order, before granting a default. Kids Bus was on notice that the consequence of its default would be the ALJ's adoption of OSHA's findings and rulings as the final order of the Secretary of Labor. *See* § 18.39(b). OSHA made all the factual findings necessary to an order on the merits, money damages and other relief. Thus, without objection, the ALJ entered a "decision containing . . . findings, appropriate conclusions, and [an] order" within the meaning of § 18.5(b). R. D. & O. at 2. Further, Kids Bus has raised no objection to the ALJ's decision on automatic review to us. Therefore, we **AFFIRM** the ALJ's R. D. & O.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge