



**In the Matter of:**

**LARRY TEVEPAUGH,**

**ARB CASE NO. 07-099**

**COMPLAINANT,**

**ALJ CASE NO. 2006-STA-050**

**v.**

**DATE: November 29, 2007**

**J & B EXPRESS TRUCKING,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER**

**BACKGROUND**

The Complainant, Larry Tevepaugh, filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Respondent, J & B Express Trucking, violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA)<sup>1</sup> and its implementing regulations<sup>2</sup> when J & B terminated his employment because he complained that the company required its drivers to violate OSHA's hours of service regulations.<sup>3</sup> OSHA investigated the

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 2007). The STAA has been amended since Tevepaugh filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amended provisions are applicable to this complaint because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

<sup>2</sup> 29 C.F.R. Part 1978 (2007).

<sup>3</sup> Hours of service regulations limit the number of hours a commercial truck driver may operate his or her vehicle during any given day and 7-day period. 49 C.F.R. § 395.3 (2007).

complaint and found it to have no merit. Tevepaugh objected and requested a hearing by a Department of Labor Administrative Law Judge (ALJ).<sup>4</sup>

On January 30, 2007, the ALJ issued an Order in which he noted that it was necessary to schedule a conference call between the ALJ and the parties but that his office had made numerous unsuccessful attempts to contact Tevepaugh. Accordingly, he ordered the parties to participate in a conference call on February 6, 2007, at 10:00 a.m. and to notify the ALJ's office if the date and time were not convenient. The ALJ warned the parties that the case could be dismissed if the parties did not comply with the Order.<sup>5</sup> The Respondent's representative was available at the designated time, but Tevepaugh was not. When the ALJ's office phoned him, he stated that he was at a medical appointment and when the office tried to determine a convenient time for the call, Tevepaugh hung up.<sup>6</sup>

On February 12, 2007, the ALJ issued a Notice of Hearing and Prehearing Order setting the hearing for June 5, 2007,<sup>7</sup> and on May 23, 2007, he issued a Notice of Hearing confirming the June 5th date and setting the hearing for 9:00 a.m. in Farmington Hills, Michigan.<sup>8</sup> Joann Balk (now Joann Figana) appeared at the hearing to represent J & B, but Tevepaugh did not appear.<sup>9</sup> The ALJ opened the hearing, requested the appearances and noted that Tevepaugh had not appeared. He then orally issued an order to Tevepaugh to show cause within two weeks why his complaint should not be dismissed for his failure to appear at the hearing.<sup>10</sup> The ALJ also issued a written Order to Show Cause on June 6, 2007.

Tevepaugh failed to respond to the ALJ's Show Cause Order. Accordingly, citing 29 C.F.R. § 18.6(d)(2)(v),<sup>11</sup> the ALJ issued a recommended "**ORDER** that the

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<sup>4</sup> See 29 C.F.R. § 1978.105(a).

<sup>5</sup> ALJ Order dated Jan. 30, 2007.

<sup>6</sup> *Tevepaugh v. J & B Trucking*, 2006-STA-050, slip op. at 1 (July 16, 2007) (R. D. & O.).

<sup>7</sup> Notice of Hearing and Prehearing Order, Feb. 12, 2007.

<sup>8</sup> Notice of Hearing, May 23, 2007.

<sup>9</sup> R. D. & O. at 1.

<sup>10</sup> Order to Show Cause, June 6, 2007.

<sup>11</sup> This regulation provides that an ALJ, to dispose of the proceeding without unnecessary delay, may render a decision against a party who fails to comply with an ALJ order.

Complainant's request for a hearing in this matter is **DISMISSED** and **JUDGEMENT BY DEFAULT** is entered against him."<sup>12</sup>

According to the STAA's implementing regulations and the Secretary of Labor's Delegation of Authority, the Administrative Review Board issues the final agency decision and order in STAA cases.<sup>13</sup> The Board issued a Notice of Review and Briefing Schedule apprising the parties of their right to submit briefs supporting or opposing the ALJ's recommended decision.<sup>14</sup> Tevepaugh did not respond; J & B forwarded a copy of the ALJ's R. D. & O.

## DISCUSSION

In examining the ALJ's decision, we review his legal conclusions de novo, and his factual findings under the substantial evidence standard.<sup>15</sup>

The STAA's implementing regulations provide that hearings "shall be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges promulgated at 29 CFR Part 18, 48 FR 32538 (July 15, 1983), amended at 49 FR 2739 January 20, 1984."<sup>16</sup> In turn, these Rules of Practice and Procedure provide:

A party shall be deemed to have abandoned a request for

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<sup>12</sup> R. D. & O. at 2.

<sup>13</sup> 29 C.F.R. § 1978.109(c)(2); Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. 2000-STA-017 (ARB May 30, 2001).

<sup>14</sup> 29 C.F.R. § 1978.109(c)(2).

<sup>15</sup> See 5 U.S.C.A. § 557(b) (West 1996) ("On appeal from or on review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ."); 29 C.F.R. § 109(c)(3)(on review before ARB, the ALJ's "findings . . . with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive"); see also *Palmer v. Western Truck Manpower, Inc.*, 1985-STA-006, slip op. at 1-2 (Sec'y Jan. 16, 1987) ("I have limited my review to an examination of whether the case record contains substantial evidence to support the ALJ's findings of fact and whether the ALJ's decision is in accordance with law. This is the standard of review which I will apply to all ALJ decisions covered by the newly promulgated regulations implementing section 2305 of the STAA."), *vacated and remanded on other grounds, Western Truck Manpower*, 943 F.2d 56 (9th Cir. 1991) (unpublished).

<sup>16</sup> 29 C.F.R. § 1978.106(a).

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 § 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.<sup>17]</sup>

As the Board recently held in *Berg v. Swift Transp.*, “Dismissal as a sanction for failure to prosecute is a matter within the sound discretion of the administrative law judge.”<sup>18</sup> As was true of the complainant Berg, Tevepaugh “repeatedly failed to comply with procedural orders and neither appeared for nor explained his absence from the hearing.”<sup>19</sup> Furthermore, he neither responded to the ALJ’s Order to Show Cause, nor did he take advantage of his opportunity to explain his actions to the Board. Having reviewed the record and the ALJ’s R. D. & O., we conclude that Tevepaugh’s complaint should be dismissed because he abandoned his claim. Accordingly, the Board **ACCEPTS** the ALJ’s recommendation and **DISMISSES** Tevepaugh’s complaint.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**

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<sup>17</sup> 29 C.F.R. § 18.39(b).

<sup>18</sup> ARB No. 07-046, ALJ No. 2006-STA-013, slip op. at 2 (Feb. 28, 2007)(citation omitted).

<sup>19</sup> *Id.* at 2-3.