U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

LARRY BARNUM, **ARB CASE NO. 08-030**

COMPLAINANT, **ALJ CASE NO. 2008-STA-006**

v. **DATE: February 27, 2009**

J.D.C. LOGISTICS, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Larry Barnum filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that his former employer, J.D.C. Logistics, Inc. (J.D.C.) violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified,[1] when it terminated his employment for his complaints concerning violations of a Department of Transportation (DOT) hours of service regulation.[2] The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. After a hearing at which J.D.C. failed to appear,

[1] 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Barnum filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary to decide whether the amendments are applicable to this complaint, because they are not relevant to the issues presented by the case and thus, they would not affect our decision.

[2] *See* 49 U.S.C.A. § 395.3 (West 2008).

a Labor Department Administrative Law Judge (ALJ) recommended that Barnum be reinstated and awarded back pay with interest and compensatory damages. We affirm.

BACKGROUND

Barnum was hired in December 2006 to drive trucks for J.D.C., a commercial motor carrier engaged in transporting various products on the highways.[3] On January 18, 2007, while Barnum was driving an assigned route, he called and informed his J.D.C. dispatcher that he could not complete his assigned route that day without exceeding the maximum allowable driving hours that a DOT regulation prescribes.[4] Thus, Barnum told the J.D.C. dispatcher that he would leave his trailer with its remaining load at the company terminal where he was located so that it could be delivered by another company driver, and that Barnum would drive the company tractor back to his home.[5] The J.D.C. dispatcher responded that Barnum was not authorized to drive the tractor home and that if he did so, the company would hold his pay indefinitely and charge him a $500 fee to recover the tractor from his home.[6] Nevertheless, Barnum drove the tractor home.[7] On January 21, 2007, when he was next eligible to drive, Barnum contacted J.D.C. to inform it that, although the tractor had become stuck in his driveway, he was ready for a new dispatch.[8] Barnum indicated that he was told that he was not scheduled to deliver a load that day, but a wrecker would be sent to his home the following day to pull out the tractor.[9]

After receiving no further communication from J.D.C. for a week, Barnum wrote J.D.C. a letter on January 28, 2007, in which he stated that he now assumed that J.D.C. had terminated his employment as of January 18th.[10] On February 2, 2007, Barnum filed the aforementioned complaint with OSHA, alleging that J.D.C. violated the STAA when it terminated his employment in retaliation for his refusal to drive over the maximum allowable driving hours. On February 13, 2007, J.D.C. wrote a letter to Barnum, stating that it had "accepted [Barnum's]

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3 Hearing Transcript (HT) at 28; *see* Sept. 18, 2007 OSHA Administrator's Findings at 1.

4 HT at 13-15, 17, 22-23; *see* 49 U.S.C.A. § 395.3.

5 HT at 23-24.

6 HT at 24; Complainant's Exhibit (CX) 13.

7 HT at 25.

8 HT at 25, 34-35.

9 HT at 25, 35-36.

10 CX 12; HT at 26.

resignation as a company driver," effective January 30, 2007.[11] Barnum testified that he never resigned, was ready to go back to work, and had been, effectively, fired.[12]

OSHA investigated the complaint, concluded that J.D.C. had not violated the Act, and dismissed the complaint.[13] On October 10, 2007, Barnum requested a hearing before one of the Labor Department's Administrative Law Judges. A Notice of Hearing was sent via regular mail to both Barnum and J.D.C., notifying them that a hearing was scheduled on November 13, 2007, and that the parties were to exchange their pre-hearing submissions by November 1, 2007.[14] By letter dated November 2, 2007, Barnum notified the ALJ that he had provided his pre-hearing submissions to J.D.C., as well as the ALJ, via over-night mail, but that J.D.C. had not sent Barnum anything as of November 1, 2007.[15] Ultimately, Barnum appeared pro se at the hearing held on November 13, 2007, but despite the Notice of Hearing and Barnum's pre-hearing submissions, J.D.C. failed to appear.[16] After the hearing, the ALJ issued an Order to Show Cause as to why a default decision should not be entered against J.D.C. pursuant to 29 C.F.R. § 18.5(b) (2007), which was sent via certified mail and which FedEx records indicate was delivered to J.D.C. on November 15, 2007.[17]

On December 8, 2007, the Administrative Law Judge (ALJ) issued his recommended decision, noting that J.D.C. did not respond to the ALJ's Order to Show Cause.[18] The ALJ concluded that Barnum established a prima facie case of retaliatory discharge under the STAA and that, as J.D.C. defaulted, it failed to rebut that prima facie case by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision.[19] Consequently, the ALJ recommended that Barnum be reinstated and awarded back pay with interest and compensatory damages.

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[11] CX 16. Although the OSHA Administrator's Findings indicate that J.D.C. computer records show that Barnum called J.D.C. on January 30 and resigned, there is no evidence in the record to support that finding. *See* Sept. 18, 2007 OSHA Administrator's Findings at 2. On the other hand, a police report relating an incident involving the efforts of a towing company's driver that J.D.C. hired to retrieve the tractor from Barnum's home indicates that the driver stated he had been hired to pick up the tractor "from a gentleman who had been fired." CX 18.

[12] HT at 36.

[13] *See* Sept. 18, 2007 OSHA Administrator's Findings.

[14] *See* Oct. 22, 2007 Notice of Hearing.

[15] *See also* HT at 6.

[16] HT at 4.

[17] *See also* Dec. 10, 2007 ALJ's Legal Assistant Report of Contact.

[18] *Barnum v. J.D.C. Logistics, Inc.*, 2008-STA-006, Recommended Order (R.O.) at 1.

[19] R.O. at 4.

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.[20] The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."[21] Although the Board issued a Notice of Review and Briefing Schedule permitting either party to submit briefs in support of or in opposition to the ALJ's order, neither party filed a brief.

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.[22] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[23] Therefore, the Board reviews the ALJ's conclusions of law de novo.[24]

DISCUSSION

The Legal Standards

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 protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[25]

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[20] 29 C.F.R. § 1978.109(c)(1) (2008).

[21] 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

[22] 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. 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). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[23] 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

[24] *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

[25] 49 U.S.C.A. § 31105(a)(1).

To prevail on this STAA claim, Barnum must prove by a preponderance of the evidence that he engaged in protected activity, that J.D.C. was aware of the protected activity, that J.D.C. took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[26] If Barnum fails to prove any one of these elements, we must dismiss his claim.[27]

The regulations at 29 C.F.R. § 18.39(b) governing proceedings before an ALJ provide that if a party fails to appear for a scheduled hearing without good cause "[a] default decision, under § 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing."[28] Section 18.5(b) provides:

> *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.

We have construed these two regulations to mean that when a respondent fails to appear at the hearing without good cause, 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]

The ALJ's Findings

In the case before us, the ALJ held a hearing and, although J.D.C. failed to appear, took testimony from Barnum. After the hearing, the ALJ ordered J.D.C. to show cause why a default decision should not be entered against J.D.C. pursuant to section 18.5(b). When J.D.C. did not respond to the order to show cause, the ALJ issued his Recommended Order, in which he reviewed the evidence that Barnum submitted and Barnum's testimony, which he found to be credible as to the rendition of the facts of the case.

The ALJ found that Barnum engaged in protected activity under the STAA when he informed his J.D.C. dispatcher that he could not complete his assigned route that day without

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[26] *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)

[27] *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005).

[28] 29 C.F.R. § 18.39(b) (2008).

[29] *See Assistant Sec'y of Labor & Marziano v. Kids Bus Serv., Inc.*, ARB No. 06-068, ALJ No. 2005-STA-064, slip op. at 4-5 (ARB Dec. 29, 2006).

exceeding the maximum allowable driving hours prescribed by DOT regulations.[30] Substantial evidence supports the ALJ's finding.[31] Moreover, the ALJ determined that Barnum suffered adverse employment action within the meaning of the STAA when J.D.C. did not give him additional work. Again, substantial evidence supports the ALJ's finding.[32]

Finally, the ALJ concluded that, in light of the temporal relationship between Barnum's protected activity and the adverse action, there was a causal link between the two. Because J.D.C. defaulted and, therefore, failed to introduce any admissible evidence that articulated a legitimate, nondiscriminatory reason for its employment decision, the ALJ concluded that J.D.C. violated the STAA.[33] Given the close temporal proximity between Barnum's protected activity and the adverse action, we affirm the ALJ's conclusion.[34]

The procedures the ALJ followed satisfy the requirements of the regulations. J.D.C. was on notice of the consequence of its default under section 18.39(b). Thus, without objection, the ALJ entered a decision containing findings, appropriate conclusions, and an order within the meaning of section 18.5(b). Further, J.D.C. has raised no objection to the ALJ's decision on automatic review to us.

Remedies

Reinstatement

As a successful complainant under the STAA, Barnum is entitled to an order requiring J.D.C. to reinstate him to his former position with the same pay, terms, and privileges of employment.[35] Therefore, we affirm the ALJ's order for J.D.C. to reinstate Barnum.

Back Pay

A successful complainant under the STAA also is entitled to an award of back pay.[36] Back pay is awarded from the date of the retaliatory discharge. Back pay liability ends when the

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30 R. O. at 4; *see also* 49 U.S.C.A. § 395.3.

31 *See* HT at 13-15, 17, 22-23.

32 HT at 25-26, 35-36; CX 12, 16, 18.

33 R.O. at 4.

34 *See Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 1997-SWD-002, slip op. at 6 (ARB Dec. 1, 1998) (temporal proximity between protected activity and termination plus employer's failure to provide plausible explanation for firing sufficient to establish retaliatory discharge).

35 49 U.S.C.A. § 31105(b)(3)(A)(ii).

36 49 U.S.C.A. § 31105(b)(3)(A)(iii).

employer makes a bona fide, unconditional offer of reinstatement, or, in very limited circumstances, when the employee rejects a bona fide offer.[37] The successful STAA complainant is also entitled to pre- and post- judgment interest on a back pay award.[38]

A STAA complainant like Barnum has a duty to exercise reasonable diligence to attempt to mitigate back pay damages.[39] But the employer bears the burden to prove that the complainant failed to mitigate. The employer can satisfy its burden by establishing that substantially equivalent positions were available to the complainant and he failed to use reasonable diligence in attempting to secure such a position.[40]

The ALJ found that Barnum's testimony established that after his employment with J.D.C., he worked as a truck driver for Avery Leasing of Marshall, Michigan and earned approximately $6000 for the period from June to September 2007.[41] Therefore, the ALJ reduced the amount J.D.C would have paid Barnum by the amount Avery Leasing paid him. Substantial evidence in the record as a whole supports the ALJ's recommended back pay award, and we therefore affirm that award.

Compensatory Damages

Barnum is also entitled to compensatory damages.[42] The ALJ found that Barnum testified that he suffered from "stress" and the loss of insurance and other fringe benefits as a result of J.D.C.'s wrongful adverse action.[43] After reviewing the evidence and finding Barnum's testimony credible, the ALJ awarded Barnum $5,000 in compensatory damages for the stress and effects of the loss of the fringe benefits he suffered.[44] The ARB has affirmed reasonable emotional distress awards based solely on the employee's testimony.[45] As substantial evidence

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[37] *Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op. at 5 (ARB Jan. 31, 2008).

[38] *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034, slip op. at 9 (ARB Dec. 29, 2000).

[39] *Hobson*, slip op. at 6.

[40] *Hobson*, slip op. at 6, citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).

[41] R.O. at 5; *see* HT at 27-28.

[42] 49 U.S.C.A. § 31105(b)(3)(A)(iii).

[43] R.O. at 6-7; *see* HT at 33, 47.

[44] R.O. at 7-8.

[45] *See Hobson*, slip op. at 8, 9 n.36, and cases cited therein.

supports the ALJ's finding and since the ALJ did not abuse his discretion in recommending a $5,000 award for compensatory damages, we affirm that award.

CONCLUSION

Substantial evidence supports the ALJ's findings that Barnum engaged in STAA protected activity and that J.D.C. took adverse action against him because of that activity. Furthermore, substantial evidence supports the remedies that the ALJ recommended. Therefore, since J.D.C. has violated the STAA, Barnum is entitled to the remedies the ALJ awarded and the ALJ's R. O. is **AFFIRMED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge