



In the Matter of:

REBECCA S. CLAYPOOLE,
COMPLAINANT,

ARB CASE NO. 08-058

ALJ CASE NO. 2008-STA-002

v.

DATE: November 28, 2008

U.S. XPRESS ENTERPRISES, INC.,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rebecca S. Claypoole, *pro se*, Palm Springs, Florida

For the Respondent:

Russell W. Gray, *Baker Donelson*, Chattanooga, Tennessee

ORDER OF REMAND

BACKGROUND

The Complainant, Rebecca S. Claypoole, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, U.S. Xpress Enterprises, Inc., retaliated against her in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act of

1982 (STAA)¹ and its implementing regulations² when it terminated her employment after she complained that her truck was unsafe to drive because exhaust fumes were leaking into the cab and making her ill.³ Following an investigation, an OSHA Regional Administrator, acting for the Secretary of Labor, found “that it is reasonable to believe that Respondent did not violate 49 U.S.C. §31105.”⁴ Claypoole objected to the Secretary’s findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).⁵

The ALJ issued an Order on January 17, 2008, rescheduling the hearing at the Respondent’s request and setting it for March 14, 2008, in Fort Myers, Florida.⁶ He provided in the order that the parties were to complete discovery by February 29, 2008, and file pre-hearing submissions fifteen workdays prior to the scheduled hearing.⁷ The ALJ served the order on Claypoole at an address in Naples, Florida that she had indicated on the envelope of the letter she had filed requesting a hearing.⁸

The Respondent’s counsel informed the ALJ that he had made several unsuccessful attempts by mail and telephone to contact Claypoole so that he could serve her with discovery requests.⁹ The ALJ issued an Order to Show Cause on February 12, 2008, requiring Claypoole to advise him within ten days of her current mailing address and her current telephone number or show cause why her complaint should not be dismissed.¹⁰ The ALJ mailed the Show Cause Order to the Naples address and to an

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Claypoole filed her 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 29 C.F.R. Part 1978 (2007).

³ Secretary’s Findings at 2 (Aug. 31, 2007).

⁴ *Id.* at 1.

⁵ *See* 29 C.F.R. § 1978.105.

⁶ Recommended Order of Dismissal (R. O. D.) at 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *Id.*

alternative post office box that OSHA had given the Respondent.¹¹

As of March 5, 2008, Claypoole had not responded to the Show Cause Order and she had not filed any pre-hearing submissions pursuant to the order rescheduling the case for hearing.¹² Accordingly, the ALJ found, “Since I have received no communication from the complainant, I have no choice but to dismiss her complaint.”¹³

According to the STAA’s implementing regulations, this Board issues the final decision and order in STAA cases.¹⁴ Thus the Board automatically reviews administrative law judges’ recommended STAA decisions regardless whether a party seeks review of the decision.

On March 13, 2008, the ALJ received a letter by facsimile from Claypoole. It stated:

I am writing in regards to my case scheduled before a judge on the 13th of this month I believe to be held in Fort Myers, FL. I have been unable to find the name and the address and or phone number of who it was though, for I need to reschedule this hearing. I have been and currently am having several medical issues. I am also currently homeless and very broke. I am currently taking turns staying with different people so I won’t get any sicker. I am unable to work as of yet, for the doctor I last saw said that he would only release me for training perhaps but not for work. They are still trying to figure out what is going on, for ever since I was exposed to carbon monoxide on more than one occasion I have not been well. Please help me reschedule the hearing.

Claypoole also provided a telephone number and address at which she could receive messages and mail.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* In support of this conclusion the ALJ cited regulations and case precedent providing that a hearing request may be dismissed on the grounds that the complainant has abandoned it and that the ALJ has the discretion to dismiss a case when the complainant has ignored an administrative law judge’s discovery, or other types of orders. R. O. D. at 2.

¹⁴ 29 C.F.R. § 1978.109(c)(2); *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).

On March 14, 2008, 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 within thirty days of that decision.¹⁵ On March 19, 2008, the ALJ issued an Order in response to Claypoole's letter stating that because he had received the letter after issuing the Order of Dismissal and Claypoole filed the letter within 30 days, he would consider it to be an appeal of his dismissal order and forward it to the Administrative Review Board for appropriate action.¹⁶

The Board received the ALJ's Order and Claypoole's letter on March 31, 2008. On April 4, 2008, the Board received a letter from Respondent urging the Board to affirm the ALJ's R. O. D. and stating that Claypoole's letter did not change its position with regard to the R. O. D.

Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.¹⁷ In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision"¹⁸ Therefore, we review the ALJ's conclusions of law de novo.¹⁹

DISCUSSION

The Board has held that that an administrative law judge has broad discretion to control the course of the proceedings before him or her.²⁰ Furthermore, we have recognized that dismissal of a complaint on the grounds of abandonment is a very serious

¹⁵ See 29 C.F.R. § 1978.109(c)(2).

¹⁶ Order (Mar. 19, 2008).

¹⁷ 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

¹⁸ 5 U.S.C.A. § 557(b) (West 2004). The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA. Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

¹⁹ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

²⁰ *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097, ALJ No. 1999-ERA-017, slip op. at 2 (Sept. 16, 1999).

sanction and we do not take it lightly.²¹ In *Harris v. Callwood*, the Court of Appeals for the Sixth Circuit concluded that dismissals for failure to comply with court orders represent a harsh sanction to be carefully reviewed on appeal and held that, “in the absence of notice that dismissal is contemplated a district court should impose a penalty short of dismissal unless the derelict party has engaged in ‘bad faith or contumacious conduct.’”²² In this case, the ALJ concluded that he was unable to consider Claypoole’s March 13th request for a postponement of the March 14th proceedings before him because he received her response after he had issued his Order of Dismissal.

Given the severity of the sanction imposed and the ALJ’s discretion to direct the proceedings before him, we believe that it is preferable for the ALJ, in the first instance, to determine, after having the opportunity to consider Claypoole’s explanation and request for a postponement, whether she has forfeited the right to continue with the prosecution of her complaint. Accordingly, we **REMAND** this case to the ALJ so that he can consider the effect, if any, of Claypoole’s March 13th letter. We note that in so doing, we do not intend to in any way suggest the outcome of the ALJ’s ultimate decision – we remand this case only in furtherance and acknowledgement of his broad discretion to manage the hearing process.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

²¹ See *Yagley v. Hawthorne Center*, ARB No. 08-042, ALJ No. 2005-TSC-003, slip op. at 2-3 (May 28, 2008).

²² 844 F.2d 1254, 1256 (1988).