In the Matter of:

TIMOTHY L. BOWENS, **ARB CASE NO. 08-073**

COMPLAINANT, **ALJ CASE NO. 2008-STA-017**

v. **DATE: March 30, 2009**

INFRASTRUCTURE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA).[1] On October 27, 2007, Timothy Bowens filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Infrastructure, violated STAA section 31105 when it terminated his employment in retaliation for engaging in protected activity. Section 31105 provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Labor Department Administrative Law Judge (ALJ) recommended that we dismiss Bowens's complaint. We accept that recommendation.

BACKGROUND

After investigating Bowens's complaint, OSHA concluded that Bowens was not an "employee" that the employee protection provisions of the STAA cover.[2] OSHA also

[1] 49 U.S.C.A. § 31105 (West 2008). Regulations that implement the STAA are found at 29 C.F.R. Part 1978 (2007).

[2] *See* 49 U.S.C.A. § 31101(2) (defining an "employee" as a driver of a commercial motor vehicle) and 49 U.S.C.A. § 31101(1) (A) (defining a "commercial motor vehicle," in

concluded that Bowens's complaint was untimely, and that Infrastructure did not violate the STAA. Bowens objected to OSHA's findings and requested a hearing before a Labor Department Administrative Law Judge (ALJ).[3]

On February 19, 2008, the ALJ issued an order requesting that the parties file prehearing statements and ordering that they complete discovery by March 3, 2008. On March 5, 2008, Infrastructure filed a motion for summary judgment and for sanctions, seeking dismissal of the complaint because Bowens had not shown that Infrastructure meets the statutory definition of an employer within the meaning of the STAA, and because Bowens had failed to respond to 39 requests for admissions, ten interrogatories, and seven requests for production of documents, all of which Infrastructure served on February 22, 2008.

On March 7, 2008, the ALJ issued to Bowens an Order to Show Cause by March 14, 2008, why Infrastructure's motion should not be granted. The show cause order informed Bowens that as a pro se litigant he was entitled to file a response to Infrastructure's motion for summary judgment and that his response was due on March 14, 2008; that the ALJ would dismiss the case if he did not file a response by March 14; that he had to identify all facts alleged by Infrastructure with which he disagreed and offer his version of the facts by affidavit or other sworn statement; and that he was entitled to file a brief in opposition to Infrastructure's brief. The order also provided that the ALJ would decide the case based on the written submissions of the parties.

On March 17, 2008, Infrastructure filed a second motion for summary judgment and/or sanctions because Bowens failed to timely respond to the order to show cause. On the same day, Bowens did not make himself available for a scheduled prehearing telephone conference and did not advise the ALJ as to why he was not participating in the conference. Also on March 17, the ALJ issued an Order cancelling the formal hearing because of Bowens's failure to respond to the show cause order and failure to be available for the prehearing conference. On March 28, 2008, the ALJ issued a Recommended Decision and Order Dismissing Complaint pursuant to 29 C.F.R. § 18.39(b) because Bowens abandoned his claim.[4]

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pertinent part, as a vehicle having "a gross vehicle weight rating or gross vehicle weight of at least 10,001, whichever is greater." None of Infrastructure's vehicles had a Gross Vehicle Weight Rating in excess of 10,001 pounds.

[3] Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 3-4.

[4] The regulation at 29 C.F.R. § 18.39(b) provides in pertinent part that a "request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it." The regulation further provides that the ALJ may enter a default decision against any party failing, without good cause, to appear at a hearing.

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to issue final agency decisions under, inter alia, the STAA and its implementing regulations at 29 C.F.R. Part 1978.[5] This case is before the Board pursuant to the STAA's automatic review provisions.[6] 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.[7] 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 . . . ."[8] Therefore, the Board reviews the ALJ's conclusions of law de novo.[9]

On April 7, 2008, the Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to submit briefs in support of or in opposition to the ALJ's R. D. & O. Neither party filed a brief.

DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution.[10] This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[11] Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." Thus, the Board will

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5 Secretary's Order 1-2002, 67 Fed. Reg. 64,672 (Oct. 17, 2002).

6 *See* 29 C.F.R. § 1978.109(a).

7 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)).

8 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

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

10 *Link v. Wabash R. R. Co.*, 370 U.S. 626, 629-30 (1962).

11 *Id.* at 630-631.

affirm an ALJ's recommended decision and order on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his case.[12]

On March 7, 2008, the ALJ issued an order to show cause why the complaint should not be dismissed, instructing Bowens that the ALJ would dismiss the case if Bowens did not file a response by March 14, 2008. Bowens did not respond to the ALJ's order. Bowens failed to file a prehearing statement, failed to respond to requests for discovery, failed to respond to the ALJ's order to show cause and Infrastructure's motion to dismiss, and failed to make himself available for a prehearing conference. Based upon the record before us, we conclude that substantial evidence and well-established legal precedent support the ALJ's recommended decision to dismiss Bowens's complaint.[13]

The ALJ also correctly denied Infrastructure's request for attorney's fees and costs incurred in seeking discovery and in filing its first and second motions for summary judgment.[14]

CONCLUSION

Accordingly, the Board **ACCEPTS** the ALJ's Recommended Order and **DISMISSES** Bowens's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

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[12] *Kruml v. Patriot Express,* ARB 03-015, ALJ No. 2002-STA-007, slip op. at 4-5 (ARB Feb. 25, 2004); *Assistant Sec'y for OSH and Reichelderfer v. Bridge Transp., Inc.*, ARB No. 02-068, ALJ No. 2001-STA-040, slip op. at 3 (ARB Aug. 29, 2003).

[13] *Rose v. ATC Vancom, Inc.,* ARB No. 05-091, ALJ No. 2005-STA-014 (ARB Aug. 31, 2006).

[14] *Krisik v. Latex Construction Co.,* 1995-STA-023, slip op. at 1 (Sec'y Oct. 20, 1995) (nothing in the STAA requires complainant to pay respondent's fees and costs incurred subsequent to complainant's abandonment of claim but prior to dismissal).