



**In the Matter of:**

**ELDRON JAMES,**

**ARB CASE NO. 10-037**

**COMPLAINANT,**

**ALJ CASE NO. 2009-STA-071**

**v.**

**DATE: March 12, 2010**

**SUBURBAN DISPOSAL, INC.,  
ROSELLE DISPOSAL,  
ROBERT & KERRY ROSELLE,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

***For the Respondent:***

**Steven S. Glassman, Esq., *Fox Rothschild LLP*, Roseland, New Jersey**

**FINAL DECISION AND ORDER  
DISMISSING COMPLAINT WITH PREJUDICE**

Eldron James filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Suburban Disposal, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,<sup>1</sup> when it demoted him and subsequently terminated his employment. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a

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<sup>1</sup> 49 U.S.C.A. § 31105 (Thomson/West 2009).

vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed James's complaint because he failed to appear at the hearing without good cause and failed to timely respond to her orders. We affirm.

## BACKGROUND

James filed a complaint with OSHA alleging that his employer violated the STAA's worker protection provisions. Following an investigation, OSHA found that a preponderance of the evidence indicated that James did not engage in any protected activity and that he was a provisional worker whose employment the Respondent terminate because there was no more work at the end of the season.<sup>2</sup>

James filed an objection to OSHA's findings and requested a hearing before a United States Department of Labor Administrative Law Judge (ALJ). After one continuance, the ALJ set the hearing for October 26, 2009, at 10:00 a.m.

On the day of the hearing, the ALJ traveled from Cherry Hill, New Jersey to the hearing site in Cranford, New Jersey, a distance of approximately 75 miles. The Respondents appeared with counsel at the appointed time and place. At 9:30 a.m. on that day, the ALJ's staff notified her that they had received a call from James's wife informing the ALJ that James was sick and would not appear at the hearing. At 10:00, the ALJ opened the record and advised the Respondents of what had occurred. The Respondents moved to dismiss the case.

Following the hearing, the ALJ issued an Order directing James to show cause within ten days from the order why his complaint should not be dismissed for failure to prosecute the claim because he had not appeared at the hearing or complied with her pre-hearing instructions set forth in her pre-hearing order. James did not comply with the order to show cause within the time specified. Thirty-two days after the deadline for filing a response, James filed his response to the order to show cause, stating that he had been "recovering from injuries that [he] sustained on October 4, 2009[,] and [his] Wife suffered a stroke after receiving the shocking news." He stated that his wife was released from the hospital on November 23, 2009, and requested a new hearing date.

The Respondents renewed their motion to dismiss the case, and pointed out inconsistencies in James's representations to the ALJ.

The ALJ thereafter issued a Recommended Decision and Order Dismissing Appeal and Request for Hearing (R. D. & O.), noting that pursuant to 20 C.F.R. § 18.39, a default decision may be entered against any party failing, without good cause, to appear at the hearing. The ALJ was unable to determine from James's conflicting and contradictory correspondence that his injuries or his wife's condition prevented him from appearing at the hearing. She explained the inconsistencies as follows:

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<sup>2</sup> Secretary's Findings at 2 (Aug. 11, 2009).

Complainant did not describe the nature and extent of the injuries he sustained, nor did he describe the circumstances underlying the alleged accident. Complainant did not explain how his injuries immobilized him or otherwise prevented him from seeking a continuance of the scheduled hearing in advance. Complainant provided no documentation in support of his contention that he was recovering from injuries sustained weeks earlier than the scheduled hearing date. When the individual purporting to be his wife contacted my office on the date of the hearing, she stated merely that Complainant was sick and would not appear. Most distressingly, this phone call on October 26, 2009 directly casts into question the allegation by Complainant that his wife suffered a stroke on October 4, 2009, and her alleged release from the hospital on November 23, 2009. It is implausible that Complainant's purported wife would call my office from her hospital bed on the morning of the hearing. Additional doubt in Complainant's assertions was created by a telephone message recorded on my staff's voice mail on December 4, 2009 at 6:46 p.m., in which an individual purporting to be Complainant asked for more time to respond to my Order to show cause, stating that he was recently released from the hospital and that he had asked his wife to call on the date of the hearing to advise that he could not attend because he was in the hospital.<sup>[3]</sup>

Thus, the ALJ found that James did not establish good cause for his failure to comply with her order to show cause because his explanations were inconsistent, contrary, and not supported by any documentary evidence. Accordingly, the ALJ found that James's request for a hearing should be dismissed.

### **JURISDICTION AND STANDARD OF REVIEW**

The case is now before the Administrative Review Board (ARB or the Board) pursuant to the STAA's automatic review provisions.<sup>4</sup> The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."<sup>5</sup>

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.<sup>6</sup> In reviewing the ALJ's conclusions of

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<sup>3</sup> R. D. & O. at 3.

<sup>4</sup> 49 U.S.C.A. § 31105(b)(2)(C); *see* 29 C.F.R. § 1978.109(c)(1)(2009).

<sup>5</sup> 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050, slip op. at 2 (ARB Sept. 26, 2001).

law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." <sup>7</sup> Therefore, the Board reviews the ALJ's conclusions of law de novo. <sup>8</sup>

The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in her or him to preside over the proceedings. <sup>9</sup>

The Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to file briefs with the Board in support of or in opposition to the ALJ's recommended order within thirty days of the date on which the ALJ issued it or by January 15, 2010. <sup>10</sup> While Suburban Disposal Inc. filed a brief, James failed to do so.

## DISCUSSION

The ALJ scheduled a hearing and James failed to appear. After the hearing, the ALJ ordered James to show cause why his claim should not be dismissed for failure to prosecute. After finding James's responses inconsistent, contrary, and not supported by any documentary evidence, the ALJ issued her R. D. & O. dismissing the claim.

The regulations at 29 C.F.R. § 18.39(b) governing proceedings before an ALJ provide that:

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<sup>6</sup> 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)).

<sup>7</sup> 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

<sup>8</sup> *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

<sup>9</sup> *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115, ALJ Nos. 2004-SOX-020, 2004-SOX-036, slip op. at 8 (ARB June 2, 2006); *Waechter v. J.W. Roach & Sons Logging and Hauling*, ARB No. 04-183, ALJ No. 2004-STA-043, slip op. 2 (ARB Dec. 29, 2005). *See also Dickson v. Butler Motor Transit/Coach USA*, ARB 02-098, ALJ 2001-STA-039, slip op. at 4 (ARB July 25, 2003) (concluding that the ALJ acted "well within his discretion in determining that dismissal was the appropriate sanction for failure to comply with the ALJ's orders pursuant to Section 18.6(d)(2)") and *Link v. Wabash R. R. Co.*, 370 U.S. 626, 633 (1962) (stating that whether a District Court may dismiss a complaint for failure to prosecute depends on whether it was within the permissible range of the court's discretion).

<sup>10</sup> *See* 29 C.F.R. § 1978.109(a).

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 § 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.<sup>[11]</sup>

We consider whether the ALJ abused her discretion when she dismissed James's appeal for failure to appear at the hearing and for failure to comply with her orders.

The ALJs' inherent power to dismiss a case for lack of prosecution arises from the control necessarily vested in courts to manage their affairs so as to achieve the orderly and expeditious disposition of cases.<sup>12</sup> ALJs must exercise this power discreetly, however, fashioning appropriate sanctions for conduct that abuses the judicial process.<sup>13</sup> Because dismissal is perhaps the severest sanction and because it sounds "the death knell of the lawsuit," [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious."<sup>14</sup>

The record supports the ALJ's conclusion that James abandoned his claim under 29 C.F.R. § 18.39(b). He notified the ALJ a mere thirty minutes before the hearing was to begin that he would not be there and he failed to provide any evidence to support or fully explain his reasons for being unable to appear or for being unable to notify the ALJ of his intended absence prior to the hearing date. Additionally, he failed to respond to the ALJ's pre-hearing order entirely and failed to respond to the ALJ's order to show cause in a timely manner. The submission he did proffer in response to the order to show cause was vague and inadequate to explain his failure to appear. The several representations of James and his wife to the ALJ appear to be inconsistent and incredible. Furthermore, if James did believe that the ALJ

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<sup>11</sup> 29 C.F.R. § 18.39(b).

<sup>12</sup> *Dorman v. Chinook Charter Servs.*, ARB No. 08-011, ALJ No. 2007-STA-028, slip op. at 2 (ARB Feb. 19, 2009) (citing *Link v. Wabash R. R. Co.*, 370 U.S. 626, 629-30 (1962)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting *Somerson v. Mail Contractors of Am.*, ARB No. 02-057, ALJ Nos. 2002-STA-018, 2002-STA-019, slip op. at 8-9 (ARB Nov. 25, 2003) (citations omitted)).

misconstrued the circumstances of his failure to attend or timely notify the ALJ of his absence, he failed to take advantage of the opportunity to file a brief with the Board explaining any error he believed that the ALJ had made in her R. D. & O.

For these reasons, the ALJ did not abuse her discretion in finding that James abandoned his claim and in recommending that James's claim be dismissed for failure to appear at the hearing and to comply with her orders.

#### **CONCLUSION**

The ALJ acted within her discretion in dismissing James's complaint because James failed to appear at the hearing or to timely respond to her orders and did not establish that there was good cause for these failures. Accordingly, we accept her recommendation that this complaint be **DISMISSED**.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**