



In the Matter of:

JOHN ELLIS,

ARB CASE NO. 10-128

COMPLAINANT,

ALJ CASE NO. 2010-STA-039

v.

DATE: November 24, 2010

EBENAL GENERAL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge* and Joanne Royce, *Administrative Appeals Judge*

**FINAL DECISION AND ORDER GRANTING REQUEST TO WITHDRAW
OBJECTIONS TO SECRETARY'S FINDINGS**

The Complainant, John Ellis, filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Respondent, Ebenal General, violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA)¹ and its implementing regulations² when it terminated his employment in violation of the STAA because he complained about defective equipment. OSHA investigated the complaint and found it to have no merit (Secretary's preliminary findings).

Ellis objected and requested a hearing by a Department of Labor Administrative Law Judge (ALJ).³ Shortly thereafter, Ellis contacted the ALJ indicating his intent to dismiss the

¹ 49 U.S.C.A. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

² 29 C.F.R. Part 1978 (2010).

³ See 29 C.F.R. § 1978.105(a).

case, and on July 20, 2010, Ellis filed a motion indicating he would “like to dismiss [his] claim against them.”⁴ On July 22, 2010, the ALJ issued a Recommended Order of Dismissal (R. O.).

The STAA and its regulations do not specifically provide for withdrawal of a complaint once the case has been referred to an administrative law judge for hearing, but as the ALJ recognized, the STAA’s implementing regulations do provide:

At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.^[5]

The ALJ construed Ellis’s Motion to Dismiss as a withdrawal of objections to the Secretary’s preliminary findings pursuant to 29 C.F.R. § 1978.111(c), cancelled the hearing, and issued an order recommending that the Secretary’s findings be reinstated, and the matter be dismissed. R. D. & O. at 1.

The ALJ forwarded the file and his recommended decision to the Administrative Review Board for review and to issue a final agency decision pursuant to the STAA’s automatic review provisions.⁶ The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.⁷ When reviewing STAA cases, the Board is bound by the ALJ’s factual findings if those findings are supported by substantial evidence in the record considered as a whole.⁸ In reviewing the ALJ’s legal conclusions, the Board, as the Secretary’s designee, acts with “all the powers [the Secretary]

⁴ Motion to Dismiss at 1.

⁵ 29 C.F.R. § 1978.111(c).

⁶ See 29 C.F.R. § 1978.109(a).

⁷ Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(c).

⁸ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, 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).

would have in making the initial decision”⁹ Therefore, the Board reviews the ALJ’s legal conclusions de novo.¹⁰

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.¹¹ Ebenal General wrote to the Board indicating that it would not be filing a brief. Ellis also did not file a brief.

Ellis has not objected to the ALJ’s decision to treat his Motion to Dismiss as a request to withdraw his objections to the Secretary’s preliminary findings, and we know of no reason to reject the ALJ’s recommended decision. Accordingly, we **GRANT** the request to withdraw the objections to the Secretary’s preliminary findings and **AFFIRM** those findings denying Ellis’s complaint as provided in 29 C.F.R. § 1978.111(c).

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁹ 5 U.S.C.A. § 557(b) (West 1996).

¹⁰ *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

¹¹ *See* 29 C.F.R. § 1978.109(c)(2).