In the Matter of:

HARRY SMITH, **ARB CASE NO. 14-063**

COMPLAINANT, **ALJ CASE NO. 2006-STA-032**

v. **DATE: December 10, 2014**

LAKE CITY ENTERPRISES, INC.,

and

CRYSTLE L. MORGAN,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard R. Renner, Esq., *Kalijarvi, Chuzi, Newman & Fitch, P.C.*, Washington, District of Columbia

For the Respondent:
Brent L. English, Esq., *Law Offices of Brent L. English*, Cleveland, Ohio

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Brown, concurring, in part, and dissenting, in part.

ORDER DENYING MOTION TO REOPEN FOR LACK OF JURISDICTION

On November 15, 2005, Harry Smith filed a complaint alleging that his employer, Lake City Enterprises, Incorporated (LCE), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) and implementing regulations. 49 U.S.C.A. § 31105 (Thomson/West 2011)(STAA); 29 C.F.R. Part 1978 (2013). After

proceedings before a Department of Labor Administrative Law Judge (ALJ) and the Administrative Review Board (ARB or Board),[1] Smith petitioned the United States Court of Appeals for the Sixth Circuit for review.

On April 11, 2014, Smith move the court of appeals for an extension of time to file his opening brief, so that he could file a motion with the ARB "for an order indicating that on remand it would reopen the case to consider new evidence." *Smith v. Perez*, 6th Cir. Case No. 13-4342 (Appellant's Consent Motion for Extension of Time at 2). The court of appeals granted the motion on April 22, 2014. On June 9, 2014, Smith filed with the ARB a Motion to Reopen the record for the submission of new evidence. On June 24, 2014, Smith moved the court of appeals to suspend the briefing schedule pending the ARB's action on the Motion to Reopen. The court of appeals granted the motion on July 8, 2014, and directed Smith to file monthly status reports. For the following reasons, we dismiss Smith's Motion to Reopen for lack of jurisdiction.

DISCUSSION

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions under the STAA and its implementing regulations.[2] Under STAA, a person adversely affected by a final Department of Labor decision arising under the Act's employee protection provision may petition for review in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. 49 U.S.C.A. § 31105(d). An order of the Secretary of Labor subject to review in a court of appeals "is not subject to judicial review in a criminal or other civil proceeding." *Id.* The court of appeals in this case did not remand the case to the agency; instead, the court suspended the briefing schedule pending the ARB's ruling on Smith's Motion to Reopen. Absent a remand, however, the agency lacks jurisdiction to rule on Smith's motion. While Federal Rule of Appellate Procedure 12.1 permits a "timely motion . . . in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending," this rule does not apply to review of an agency order. *See* Fed. Rule App. P. 20 ("all provisions of these rules, except Rule 3-14 and 22-23, apply to the review or enforcement of an agency order"); *see also* Sixth

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[1] The ALJ dismissed Donald Morgan, Crystle Morgan's husband, as a respondent and found her to be LCE's sole owner and therefore liable for violating the STAA. *Smith v. Lake City Enters., Inc*., ALJ No. 2006-STA-032, slip op. at 139 (May 21, 2008). The ARB affirmed. *Smith v. Lake City Enters., Inc*., ARB Nos. 08-091, 09-033; ALJ No. 2006-STA-032, slip op. at 8-9 (Sept. 28, 2010).

[2] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. Part 1978.

Circuit Rule 20 (same). Since the appellate court did not remand this case to the ARB, we lack jurisdiction to entertain Smith's motion to reopen.

Assuming that the ARB had jurisdiction over Smith's motion, the ARB "may order an ALJ to reopen the record to receive evidence and reconsider his or her findings based on that evidence where the proffered evidence is relevant and material and was not available prior to the closing of the record." *Pollock v. Cont'l Express*, ARB No. 07-073, ALJ No. 2006-STA-001, slip op. at 14, n.94 (ARB Apr. 7, 2010); *see also* 29 C.F.R. § 18.54(c)(2013). At the outset, however, the evidence Smith proffered with his motion (four pages of testimony by Craig Smith in a different administrative proceeding) does not appear to be material because it would not be likely to change the result in this case. *See, e.g., Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1256-1257 (11th Cir.2009). The evidence that Smith seeks to add to the administrative record does not show that Donald Morgan exercised control over Smith's employment at LCE. Indeed, Smith testified at the hearing before the ALJ that LCE owner Crystle Morgan hired and fired him and that he briefly interacted with Donald Morgan only twice during his employment at LCE.[3] Thus, if the motion to reopen were properly before the ARB, it would not likely be granted since the new evidence that complainant Smith seeks to add to the record does not appear to be material.

CONCLUSION

Smith's Motion to Reopen is **DENIED** for lack of jurisdiction**.**

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge,* concurring, in part, and dissenting, in part:

I concur with my colleagues' opinion that the ARB lacks jurisdiction to entertain Smith's motion to reopen this case to consider new evidence in the absence of remand

[3] *Smith*, ALJ No. 2006-STA-032, slip op. at 139 (citing Hearing Transcript at 344-345, 707-712).

from the Sixth Circuit. In reviewing cases arising under the STAA, the Board serves as an agency appellate body.[4] In this capacity, the Board's jurisdiction to reopen a case to consider new evidence is limited to matters pending before it as a result either of appeal from a decision of a Department of Labor ALJ or pursuant to appellate court remand. In either instance, if a party proffers new and material evidence, the Board may remand the case to the ALJ to reopen the record to reconsider the ALJ's prior decision in light of the proffered evidence.[5]

The foregoing is not, of course, what is before the ARB at this time. With the case pending before the appellate court, Smith effectively seeks what can at best be characterized as relief from a final judgment or order based on newly discovered evidence that may (or may not) give rise to a claim of fraud on the court. Since, as the majority points out, Rule 12.1 of Federal Rules of Appellate Procedure does not apply insofar as the Sixth Circuit is involved, and since the ARB does not have authority to entertain Mr. Smith's motion in the absence of jurisdiction of Smith's case itself, the ARB has no choice in this matter but to deny Smith's motion to reopen the record.

My colleagues expressed their opinion that if the ARB had jurisdiction over Smith's motion, Smith's proffered evidence would not meet the materiality test. I must dissent from the majority on this point. Inarguably the proffered evidence is newly discovered. The evidence raises the specter that Donald Morgan, although not an owner or partner in LCE, may nevertheless have been Smith's joint employer to whom liability under STAA would attach, contrary to the ALJ's original ruling in this matter based on the evidence then of record. However, whether the proffered evidence is in fact material and, equally important, whether it could not have been timely discovered, are matters the ARB is ill equipped to determine. Thus, if the ARB had jurisdiction over Smith's motion, I believe the proper recourse would have been to remand the case to the ALJ for additional evidentiary development to determine whether the evidence warrants reopening the record to reconsider Donald Morgan's potential liability.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

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[4] *See* Secretary of Labor Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.110.

[5] *Halloum v. Intel Corp*., ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 6, n.1 (ARB Jan. 31, 2006); *Madonia v. Dominick's Finer Food, Inc*., ARB No. 99-001, ALJ No. 1998-STA-002, slip op. at 4 (ARB Jan. 29, 1999).