



**Issue Date: 05 January 2005**

In the Matter of

MARC C. PENESSO  
Complainant

v.

LCC INTERNATIONAL, INC.  
Respondent

Case No.: 2005 SOX 00016

**ORDER DENYING MOTION FOR REMAND TO OSHA**

On May 28, 2004, the complainant filed a complaint arising under the employee protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. 1514A (hereinafter the "Sarbanes-Oxley Act"), with the Occupational Safety and Health Administration ("OSHA"). On November 17, 2004, OSHA issued a determination that the complaint did not fall under the Department of Labor's jurisdiction under the Sarbanes-Oxley Act. Complainant filed a timely appeal of that determination with this Office, and the case was assigned to me for hearing and decision.

On December 20, 2004, I issued a *Notice of Docketing and First Pre-Hearing Order*. Due to the possibility that the hearing would be held in Italy, and therefore may be more difficult to schedule, I did not set a hearing date. Rather, I asked for the parties' input, so that once the hearing was scheduled it would not have to be rescheduled. I did set a February 1<sup>st</sup> deadline for filing motions for summary decision.

Also on December 20th, and obviously prior to receiving my order, counsel for the Assistant Secretary of Labor for Occupational Safety and Health moved to have the case remanded to OSHA. The Assistant Secretary now believes the denial of the claim on the basis of a lack of jurisdiction was erroneous, and it wants the case remanded to enable OSHA to conduct an investigation into the merits of the case. Respondent responded to the Assistant Secretary's motion, stating that it had no objection. Moreover, respondent contends that the regulations governing Sarbanes-Oxley Act cases, at 29 C.F.R. §1980.111(b), give the Assistant Secretary the right to withdraw a determination prior to the expiration of the 30-day period to object to such order. Complainant has not responded to the motion to remand the case to OSHA.

The respondent's contention that a motion by the Assistant Secretary to withdraw a determination and remand a case to OSHA must be granted under §1980.111(b) if filed within 30 days of the determination is not well taken. That section of the regulations does permit the

Assistant Secretary to withdraw a determination at any time within the 30-day period to file objections to its determination “provided that no objection has yet been filed.” Complainant’s objection to OSHA’s determination, dated December 10, 2004, was docketed in this Office on December 13, 2004, more than a week before the Assistant Secretary filed the motion to remand the case. Accordingly, the Assistant Secretary no longer has an absolute right to withdraw OSHA’s determination.

Rather than requiring me to grant the motion to remand the case to OSHA, the regulations explicitly preclude such a remand once an objection to OSHA’s determination has been filed. Section 1980.109(a) states:

[A] complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error.

Even if the regulations did not preclude a remand, I would not grant the Assistant Secretary’s motion. Whistleblower cases generally are required to be resolved expeditiously. The goal in Sarbanes-Oxley Act cases is to complete the entire process from filing the complaint to the ultimate resolution by the Department of Labor in six months. While not casting aspersions, that it took OSHA almost that long to issue its determination cannot be ignored. Remanding the case to OSHA for further investigation would add months to the ultimate resolution of this case, and for very little potential benefit since the proceeding before the administrative law judge is *de novo*. See §1980.107(b). Moreover, only if OSHA determines that the complainant has made a prima facie showing of discrimination will OSHA conduct an investigation; and even that investigation will be cursory unless the respondent cannot show that it would have taken the same action against the complainant in the absence of the complainant’s protected activity. See §1980.104. So remanding the case may not provide any benefit. What is more, OSHA has the authority to appear as a party in this litigation regardless of its determination of the merits of the claim (*see* §1980.108(a)(1)), and if it desires OSHA can further investigate the matter through pre-trial discovery.

Since the regulations preclude a remand at this stage of the proceeding for OSHA to complete its investigation, and in any event since the little that might be achieved by a remand is far outweighed by the delay that would ensue, the motion to remand the case to OSHA is **denied**.

Finally, the parties shall respond to Paragraphs 1 and 2 of the *First Pre-Hearing Order* not later than January 19, 2005.

**A**

JEFFREY TURECK  
Administrative Law Judge