



Issue Date: 13 February 2007

CASE NO.: 2006-STA-38

IN THE MATTER OF

NORMAN BARNETT,
Complainant

vs.

LATTIMORE MATERIALS, INC.,
Respondent.

RECOMMENDED DECISION AND ORDER ON
MOTION FOR SUMMARY DECISION

Background

This matter involves a complaint under the Surface Transportation Act, P.L. 103-272¹ and the regulations promulgated thereto.² The complaint was brought by Norman Barnett (Complainant) against Lattimore Materials, LP (Respondent). Complainant objected to the findings of the initial investigation by the Occupational Safety and Health Administration (OSHA) and requested a hearing. The case was referred to this Court and the hearing was eventually set for 21 Feb 07.

The formal complaint Complainant filed with the Court is the same as the one he filed with OSHA. It is neither sworn nor verified and included no supporting affidavits or sworn statements. It alleges that Complainant was fired after and in retaliation for refusing to operate a truck that he reasonably believed to be unsafe. Respondent filed a

¹ 49 U.S.C. § 3115 *et seq.*

² 29 C.F.R. Part 1978.

motion for summary decision that was accompanied by an extract of Complainant's deposition, six affidavits from co-workers, an unsworn written statement by a coworker, and the OSHA findings.³ Complainant filed an answer to the motion, but attached no affidavits, sworn statements or other supporting documents.

Law

The Act prohibits employers from taking adverse action against an employee if “the employee refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.”⁴ It provides that

an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.⁵

Parties are allowed to seek a summary decision without a full hearing.⁶ They are entitled to a summary decision if:

the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.⁷

Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.⁸

³ As this is a de novo review, I have not considered the OSHA report for any purpose.

⁴ 49 U.S.C. §31105(a)(1)(B)(ii).

⁵ 49 U.S.C. §31105(a)(2).

⁶ 29 C.F.R. § 18.40.

⁷ 29 C.F.R. §§ 18.40(d), 18.41(a).

⁸ 29 C.F.R. § 18.40(c).

In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."⁹ In reviewing a request for summary decision, all of the evidence must be viewed in the light most favorable to the nonmoving party.¹⁰

Once the moving party carries that burden, the nonmoving party must offer more than contrary allegations of fact by counsel in its answer brief. "It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit."¹¹

Discussion

Respondent's Submissions

In support of its motion, Respondent submitted the following:

Bruce Queen, Respondent's Production Supervisor, stated by affidavit that:

New brake drums and shoes are installed every 300 driving hours. If a driver notes a brake problem before then, the brakes are adjusted. Brakes are adjusted on an average of once a month. According to the GPS monitor on Complainant's truck, his accident was a result of excess speed. Complainant did not mention the brakes in his accident report. Complainant first mentioned the brakes after he drove the truck again, following his accident. Mr. Queen then personally drove the truck with a full load and tested the brakes, which performed perfectly. Dennis Brunson and the mechanic also tested the brakes and found them to be fine.

Complainant told Mr. Queen that Allen Rowan (another driver) told Complainant the brakes had problems. Mr. Queen asked Mr. Rowan if there were brake problems. Mr. Rowan first said no, but then said yes. After tests, Mr. Rowan had no concerns about the brakes and asked to drive that truck.

The day before Complainant refused to drive, he quizzed Mr. Queen about the condition of the brakes. Mr. Queen described to Complainant all of the testing done on the brakes and that they were fine. The next day, Complainant refused to drive the truck when assigned. Another driver took the truck and the brakes were fine.

⁹ *Wise v. E.I. DuPont De Nemours and Co.*, 58 F.3d 193 (5th Cir. 1995).

¹⁰ *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

¹¹ *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160-161 (1970) (citing 6 J.Moore, Federal Practice 56.22(2), pp. 2824-2825 (2d ed. 1966)).

Jason Lang, Respondent's batchman, stated by affidavit that:

He ordered Complainant to drive the truck and Complainant refused. Complainant never asked to see any documents, test drive the truck or otherwise see proof that the truck was safe.

Allen Rowan, a driver for Respondent, stated by affidavit that:

He has driven for Respondent for three years. On 9 Feb 06, he drove the truck Complainant later refused to drive. On one load, it seemed a little sluggish and he took it to the mechanic to get looked at. The breaks were fine. Mr. Rowan simply kept a safe driving distance. If there was a problem with the brakes on 14 Feb 06, he would have reported it. He had a couple of problems with the brakes, but they were fixed and he has since asked to drive that truck.

Mike Gonzales, a mechanic for Respondent, stated by affidavit that:

Complainant continued to drive the truck after his accident on 08 Feb 06 and then returned it to the plant. Mr. Gonzales then had the truck for several days and checked the brakes as thoroughly as possible, making sure the brakes were fine. Complainant knew the truck had been checked. Mr. Gonzalez helped Allen Rowan when Mr. Rowan thought there might be a problem with the brakes. They loaded the truck and tested the brakes. Mr. Rowan agreed that the brakes were fine and conceded that Mr. Rowan was probably driving too fast.

Patrick Garrett investigated Complainant's accident for Respondent and stated by affidavit that:

He went to the accident site and spoke to Complainant. Complainant apologized for the accident, but never mentioned the brakes to Mr. Garrett or anyone at the scene who Mr. Garrett interviewed. Neither Complainant's report nor the police report mentioned brake problems. Hours after the accident, Complainant was driving the truck at speeds of up to 55 m.p.h. On the day of and the day after the accident, Complainant filled out truck condition forms and did not mention brake problems. He checked the brake box as in proper working order.

Complainant first mentioned brake problems after returning to the plant. He said since there were no skid marks the brakes must have failed. However, there would not be skid marks, given the ABS system of the truck. The accident was caused by Complainant's excessive speed and a faulty attempted evasive maneuver.

In a deposition, Complainant stated that:

Jason Lang told him he was assigned to drive the truck. He told Mr. Lang the truck had problems. Mr. Lang told him the mechanic had adjusted the brakes and it was ready to drive. Complainant never got the keys or went to the truck. He never inspected it or test drove it.

Complainant's Response

In his response to Respondent's motion for summary decision Complainant's counsel listed "undisputed facts." They included specific allegations of communications and events that counsel argues, at the very least, creates a genuine issue of material fact as to the reasonableness of Complainant's refusal to drive the truck. However, a recitation of facts by counsel in a brief, even if labeled undisputed,¹² would not be admissible as evidence at hearing and does not qualify as countering evidentiary materials.

Analysis

In the absence of any qualifying submission from Complainant, the issue before the Court is whether Respondent has, through its submissions, demonstrated the absence of any genuine issue of material fact which would allow the possibility that Complainant had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition.

Examining the evidence in a light most favorable to Complainant, the submissions leave no genuine issue of fact that:

Complainant had an accident on 8 Feb 06 due not to faulty brakes, but to excessive speed. After Complainant expressed the possibility that the brakes were faulty, they were tested and found to be operating properly. Complainant was told of that testing and the results. Another driver, Mr. Rowan, thought the brakes might have a problem and told Complainant so. The truck was checked by a mechanic and was found to be fine. Mr. Rowan and the mechanic decided Mr. Rowan was simply driving too fast. The day before Complainant refused to drive the truck, Mr. Queen described to Complainant all of the testing done on the brakes and told him that they were fine. The day Complainant refused to drive the truck he was told that the mechanic had fixed the brakes, but Complainant refused to go to the truck and test or inspect it. At no time, did any inspection show a malfunction in

¹² At this stage, even a genuine issue of disputed facts would be sufficient to defeat the motion for summary decision.

the brakes. Complainant never actually experienced a brake malfunction and was never told that an inspection or testing disclosed a brake problem.

I find that based on the properly considered evidentiary submissions, there is no genuine issue of material fact which would allow for the possibility that Complainant's refusal to drive was based on a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. Consequently, Complainant has failed to show any protected activity.

Ruling and Order

Respondent's motion for summary decision is **GRANTED** and the complaint is **dismissed**.

The hearing scheduled on Wednesday, February 21, 2007 at 9:00 a.m. in Dallas, Texas is CANCELED.

So ORDERED.



PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.