UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ADMINISTRATIVE REVIEW BOARD

In the matter of:

SAPORITO ENERGY CONSULTANTS, INC. and THOMAS SAPORITO

COMPLAINANTS,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

RESPONDENT.

_____/

ARB NO. 10-083

ALJ NO. 2009-ERA-00016

DATE: 17 MAY 2010

COMPLAINANTS' INITIAL BRIEF

Saporito Energy Consultants and Thomas Saporito, *pro se* (hereinafter "Complainants") hereby file *Complainants' Initial Brief* in the above-captioned matter and state as follows:

On April 5, 2010, the presiding administrative law judge (ALJ) issued an order granting withdrawal of claim and dismissing complaint (Order). For the reasons set-out below, Complainants request that the Administrative Review Board (ARB) review the ALJ's Order as follows:

1. The ALJ Errored by Failing to Acknowledge Rule 41 and by Construing Complainants' Motion to Withdraw Complaint as a Motion to Withdraw Their Objections to the Findings of the Occupational Safety and Health Administration

The ALJ specifically held in his Order that:

> "...Complainants filed a document in this Office on March 12, 2010, by which they purportedly withdrew their Complaint in this matter under 'Rule 41 of the Rules of Practice and Procedure of the Office of Administrative Law Judges, U.S. Department of Labor.' As there is no such rule, I construed the document as a motion for leave to withdraw their objections to the findings of the Occupational Safety and Health Administration (OSHA) under 29 CFR §24.111(c)....with this Order, the Secretary's September 9, 2009 Findings in this case are REINSTATED, AFFIRMED, and FINAL..."

Id. at pp.1-2.

First, Rule 41 does in fact exist, and can be readily found at the U.S. Department of Labor's website as illustrated below. Under Rule 41(a)(1) and (2), voluntary dismissal is permitted. *See,* Rule 41, Fed.R.Civ.P. *See, Saporito v. Houston Lighting and Power Co.,* 92-ERA-38 and 45 (Sec'y June 28, 1993). Moreover, contrary to the ALJ's Order, at no time did Complainants seek leave of the Court to withdraw their objections to the findings of OSHA. Notably, proceedings brought before an ALJ are adjudicated *de novo* and remanding the matter to OSHA is not an appropriate course of action. *See, Slavin v. UCSB Donald Bren School,* 2005-CAA-11 (ALJ June 8, 2005); and *Jones v. Pacific & Electric Co.,* 97-ERA-3 (ALJ Mar. 19, 1997).

USDOL/OALJ Nuclear and Environmental Whistleblower Digest

DIVISION XVIII -- DISMISSALS

[Last updated April 7, 2008]

KVIII. Dismissals

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2. The ALJ Errored by Dismissing the Complaint With Prejudice and by Reinstating the September 9, 2009 OSHA Findings

The ALJ specifically held in his Order that:

"...The complaint is DISMISSED WITH PREJUDICE...the Secretary's September 9, 2009 Findings in this case are REINSTATED, AFFIRMED, and FINAL..."

Id. at p.2.

However, as discussed above, proceedings before an ALJ are *de novo* and cannot be remanded back to OSHA. *See,* Section 1980.109(a) which precludes remand. Therefore, the ALJ erred by reinstating OSHA's September 9, 2009 findings because in so doing, the ALJ essentially remanded the case back to OSHA. In addition, the ALJ errored by dismissing the Complaint with prejudice against Complainants. Notably, an overwhelming body of case law exists which holds that dismissals requested under Rule 41 are adjudicated without prejudice. *See, Saporito v. Houston Lighting and Power Co.,* 92-ERA-38 and 45 (Sec'y June 28, 1993); *Anderson v. DeKalb Plating Co., Inc.,* 1997-CER-1 (ARB July 28, 1998); *Brown v. Tennessee Valley Authority,* 89-ERA-2 (Sec'y Mar. 21, 1994); *Lorenz v. Law Engineering, Inc.,* 90-CAA-1 and 2 (Sec'y mar. 12, 1992); *Thompson v. United States dept. of Labor,* 885 F.2d 551 and 556, 557 (9th Cir. 1989). Voluntary dismissal of ERA whistleblower complaints are covered by Rule 41,

Fed.R.Civ.P. *See, Rainey v. Wayne State University,* 90-ERA-40 (Sec'y Jan. 7, 1991)(order to show cause), slip op. at 3, dismissed, (Sec'y Feb. 27, 1991). Rule 41 applies because there are no procedures for voluntary dismissals contained in either the ERA, the implementing regulations at 29 C.F.R. Part 24, or the regulations at 29 C.F.R. Part 18.

CONCLUSION

In the instant action, the Respondent has not proffered any argument in favor of imposing conditions. Moreover, a review of the record clearly shows that the case did not involve any discovery, and that arguments regarding res judicata or collateral estoppel could be used by the Respondent in any future proceeding. *See, W. Allan Young v. CBI Services, Inc.*, 88-ERA-1993, (ALJ Apr. 6, 1993 RDO). With respect to remand to the OSHA determination, Section 1980.109(a) precludes a remand.

Wherefore, Complainants respectfully request that the ARB remand this case back to the ALJ to issue a new recommended decision and order dismissing the instant action <u>without</u> prejudice and <u>without</u> remanding to OSHA's September 9, 2009, determination. In the alternative, Complainant's respectfully request that the ARB issue a Final Order holding that the above-

captioned Complaint is withdrawn and dismissed without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing document was provided to those identified below by means indicated on this 17th day of May, 2010:

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