U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

NICHOLAS INGRODI, **ARB CASE NO. 2020-0030**

COMPLAINANT, **ALJ CASE NO. 2019-FRS-00046**

v. **DATE: March 31, 2021**

CSX TRANSPORTATION, INC.,

RESPONDENT.

Appearances:

For the Complainant:
Nicholas D. Thompson, Esq.; *The Moody Law Firm*; Portsmouth, Virginia

For the Respondent:
Joseph C. Devine, Esq. and Samuel E. Endicott, Esq.; *Baker & Hostetler, LLP*; Columbus, Ohio

Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges*; Judge Haynes, *concurring*

ORDER VACATING AND REMANDING

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] On November 5, 2018, Complainant Nicholas Ingrodi (Ingrodi) timely filed a complaint with the U.S. Department of Labor's

[1] 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2020).

Occupational Safety and Health Administration (OSHA), alleging that Respondent, CSX Transportation, Inc. (CSX), violated the FRSA by terminating his employment after he refused to work when he had a non-work related illness. Ingrodi had been suffering from vomiting and diarrhea. Ingrodi believed that if he had worked that day, his medical condition would have affected his ability to safely operate a train and make him a danger to himself and/or co-workers. OSHA dismissed the complaint.

Ingrodi objected to OSHA's findings and requested a formal hearing with the U.S. Department of Labor's Office of Administrative Law Judges. On November 22, 2019, CSX filed a motion for summary decision, arguing that Ingrodi could not show that he engaged in conduct protected under 49 U.S.C. § 20109(b)(1)(A) and (B). On January 31, 2020, the Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) granting CSX's motion for summary decision and dismissing Ingrodi's complaint. The ALJ found that Ingrodi's "personal, non-work related illness does not constitute a hazardous condition under the Act[]" and, therefore, "he did not engage in Act protected activity when he reported the illness and missed work."[2] This appeal followed.

On June 4, 2020, almost six months after the ALJ issued the D. & O., the Board decided *Cieslicki v. Soo Line Railroad Company*.[3] In *Cieslicki*, the Board held that a "hazardous safety or security condition" may result from an employee working in an impaired or diminished physical state and that the FRSA "does not require that a condition be 'work-related' or state that the condition cannot relate to an employee's physical condition."[4]

For the reasons set forth below, we vacate the D. & O. and remand this case to the ALJ to further develop the record and issue a decision in light of our holding in *Cieslicki*.

BACKGROUND

The facts relevant to this appeal are not in dispute.[5] Ingrodi began working for CSX as a conductor in June 2011. During Ingrodi's employment, CSX utilized a

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[2] D & O at 8-9.

[3] ARB No. 2019-0065, ALJ No. 2018-FRS-00039 (ARB June 4, 2020).

[4] *Id.* at 6 (citing 49 U.S.C. § 20109(b)(1)(A) and (B)).

[5] Unless otherwise indicated, this background follows the recitation of facts supplied by the ALJ. D. & O. at 2-5.

progressive discipline absenteeism policy under which employees accumulated points for their absences. Each time an employee accumulated twenty attendance points, he or she was subjected to a progressively higher level of discipline, culminating, at the fourth level, with the termination of employment.

Ingrodi reached the third level of CSX's absenteeism policy on August 26, 2017. Ingrodi was aware at that time that he was at the final step of the policy and that his employment would be terminated if he reached the discipline threshold again.[6] In accordance with the policy, Ingrodi's attendance points were automatically reduced to twelve following his August 26, 2017 discipline, but Ingrodi was back to a total of nineteen points after two more absences in early 2018.

On April 14, 2018, Ingrodi was suffering from vomiting and diarrhea.[7] He marked off sick that day using either CSX's "crew call" phone system or its "CrewLife" online application. During his deposition, Ingrodi suggested that employees could or did not provide information about their sickness or symptoms when marking off under these systems and Ingrodi confirmed that he did not provide CSX with any information about his condition when he first marked off sick.[8]

After marking off that he was ill, Ingrodi sought medical treatment at a local emergency department. On April 16, 2018, Ingrodi provided CSX with a form signed by his treating doctor releasing him back to work that day.[9] The form indicated that Ingrodi had been seen on April 14, 2018, and the reason for his visit was simply listed as "ILLNESS." The form provided no other information about the nature or severity of Ingrodi's medical condition. There also is no other evidence in the record that Ingrodi contemporaneously provided CSX with any other information about the reason for his absence.

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[6] According to the absenteeism policy, and based on Ingrodi's seniority, Ingrodi had to accumulate twenty-two points at the final level before his employment could be terminated.

[7] During his deposition, Ingrodi initially suggested that he had the flu. However, he later testified during his deposition that he could not recall if he received a medical diagnosis about his condition. Deposition of Nicholas Ingrodi at 57, 84-85.

[8] *Id.* at 29-30, 58.

[9] The absenteeism policy permitted employees to submit medical documentation within three days of the final day of their absence.

CSX assessed Ingrodi three points for his April 14 absence.[10] This brought Ingrodi up to twenty-two attendance points and triggered the fourth and final step in CSX's absenteeism policy. The policy required CSX to conduct a formal investigative hearing before terminating an employee's employment. Accordingly, CSX conducted a hearing on June 27, 2018.

Ingrodi testified at the hearing that he believed his symptoms on April 14 would have affected his work and made him a danger to himself and/or coworkers had he worked that day.[11]Ingrodi's girlfriend also testified at the hearing. She stated that Ingrodi was incapable of driving himself to the hospital on April 14; "so I don't think it would have been able for him [sic] to come in and operate a train or have anybody else's, you know, life in his hands."[12] Following the hearing, CSX terminated Ingrodi's employment.

Ingrodi filed a complaint against CSX with OSHA on November 5, 2018, alleging that CSX terminated his employment for "refusing to work when his medical condition prevented him from being able to safely do so."[13] OSHA dismissed the complaint, finding that Ingrodi did not engage in any activity protected by the FRSA. Ingrodi objected to OSHA's findings and requested a formal hearing with the U.S. Department of Labor's Office of Administrative Law Judges, seeking relief under the FRSA, 49 U.S.C. § 20190(b)(1) and (c)(2). On November 22, 2019, CSX filed a motion for summary decision, arguing that Ingrodi could not show that he engaged in conduct protected under either subsection of the Act.

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's protected activity.[14] As relevant to this appeal, protected activity under the FRSA includes:

> (A) reporting, in good faith, a hazardous safety or security condition; [and]

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[10] According to the absenteeism policy, CSX assessed three points per day when an employee was sick with valid medical documentation.

[11] Transcript of June 27, 2018 Investigative Hearing at 12.

[12] *Id.* at 14.

[13] OSHA Complaint of Nicholas Ingrodi at 2.

[14] 49 U.S.C. § 20109(a)–(c).

> (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties . . . .[15]

The ALJ agreed with CSX's argument and issued a D. & O. on January 31, 2020, in which he granted CSX's motion and dismissed Ingrodi's complaint.[16]

The ALJ held that, as a matter of law, Ingrodi's illness could not create a "hazardous safety or security condition" under the FRSA. Citing decisions from several federal courts, the ALJ held that Section 20109(b)(1) extends protection only to those who report, or refuse to work because of "work-related" safety conditions.[17] The ALJ found that Ingrodi's refusal to work, in contrast, was based on a "personal, non-work related illness," which the ALJ ruled was not protected under the FRSA.[18]

The ALJ issued the D. & O. almost six months before the Board decided the *Cieslicki* case. Accordingly, we vacate the D. & O. and remand this case to the ALJ to further develop the record and issue a decision in light of our holding in *Cieslicki*.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to review ALJ decisions under the FRSA.[19] The ARB reviews an ALJ's grant of summary decision de novo, applying the same

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[15] 49 U.S.C. § 20109(b)(1). Additionally, an employee's refusal to work under subsection (b)(1)(B) is only protected if the employee can also show that his refusal was made in good faith and no alternative to the refusal was available; a reasonable individual in the circumstances would have concluded that the hazardous condition presented an imminent danger of death or serious injury and the urgency of the situation did not allow sufficient time to eliminate the danger without such refusal; and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work unless the condition was corrected immediately. 49 U.S.C. § 20109(b)(1)(B), (b)(2).

[16] Ingrodi does not appeal the ALJ's decision dismissing his complaint with respect to FRSA Section 20109(c)(2). Therefore, we do not review that part of the decision.

[17] D. & O. at 8.

[18] *Id.* at 8-9.

[19] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

standard applicable to the ALJ for granting summary decision.[20] To be entitled to summary decision, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[21] The ARB views the record on the whole in the light most favorable to the non-moving party.[22]

DISCUSSION

In *Cieslicki*, the complainant had consumed alcohol before unexpectedly being called into duty. When he explained to his employer that he had consumed alcohol and therefore could not work, the railroad terminated his employment.[23] As the ALJ did in the present case, the ALJ in *Cieslicki* ruled that the phrase "hazardous safety or security condition" "contemplate[s] a work-related, rather than personal, condition within the employer's control."[24]

The Board reversed. In *Cieslicki*, the Board held that a "hazardous safety or security condition" may result from an employee working in an impaired or diminished physical state.[25] We also held that the language in Sections 20109(b)(1)(A) and (B) of the FRSA, "'hazardous safety or security condition,' does not require that a condition be 'work-related' or state that the condition cannot relate to an employee's physical condition."[26]

As the Board explained, the phrase "hazardous safety or security condition" is broad and general. The plain language of the statute does not require that a

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[20] *Neff v. Keybank Nat'l Assoc.*, ARB No. 2019-0035, ALJ No. 2018-SOX-00013, slip op. at 3 (ARB Feb. 5, 2020).

[21] 29 C.F.R. § 18.72(a).

[22] *Neff*, ARB No. 2019-0035, slip op. at 3 (citing *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018)).

[23] *Cieslicki v. Soo Line R.R. Co.*, ALJ No. 2018-FRS-00039, slip op. at 3 (ALJ June 5, 2019).

[24] *Id.* at 7.

[25] *Cieslicki*, ARB No. 2019-0065, slip op. at 6-7.

[26] *Id.* at 6.

condition be "work-related,"[27] limit protection to conditions related exclusively to equipment, tracks, or the like, or state that the condition cannot relate to an employee's personal, physical condition.[28] The Board also considered that the Department of Labor's primary purpose with respect to the FRSA's whistleblower protection provisions is safety. The Board stated that:

> [W]e also note that the Department of Labor's primary purpose, as regards the whistleblower protection provisions of FRSA, is safety. The department promotes the goal of safety by prohibiting railroad employers from taking unfavorable personnel actions against employees for reporting safety issues whether because they are illegal or "only" very dangerous. 49 U.S.C. §20109(a)(2) and (b)(1)(A) and (B).[29]

The goal of ensuring safety is promoted and applies equally whether a hazardous condition arises from equipment, or from the impaired or diminished physical condition of the person working on or operating it.[30] Indeed, the Board recognized in *Cieslicki* that human error is a common reason for accidents in the railroad industry.[31]

Finally, the Board relied on precedent interpreting an analogous provision under the Surface Transportation Assistance Act (STAA). Although the STAA

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[27] Although Section 20109(b)(1) is not limited, on its face, to "work-related" conditions, the hazardous condition that could result from an impaired railroad worker is "work-related," in that working in such a state could be material to and impact the operations of the railroad. Similarly, as we explained in *Cieslicki*, an impaired employee operating a train or train equipment is a potentially hazardous condition within the railroad's control. Once the railroad becomes aware of an employee's impairment, it has the ability, and a duty, to keep the impaired employee from working. *Id*. at 6 n.5.

[28] *Id.* at 6-7.

[29] *Id.* at 4.

[30] *Id*. We recently reiterated the Department's emphasis on safety in our recent decision in *Lancaster v. Norfolk S. Ry. Co.*, ARB No. 2019-0048, ALJ No. 2018-FRS-00032, slip op. at 6-7 (ARB Feb. 25, 2021) ("This purpose applies equally whether there is a regulatory violation or a hazardous safety condition that relates to the equipment, or the condition of a person who is working on the equipment.")

[31] *Cieslicki*, ARB No. 2019-0065, slip op. at 7 n.6.

features even narrower language than that which appears in the FRSA,[32] the Board recognized that for decades, the ARB and the Secretary of Labor before that have held that an employee's physical condition, whether it be from illness, fatigue, or other impairment, could create a hazardous safety or security condition because it relates to a "reasonable apprehension of serious injury to the employee or the public. . .."[33] As *Cieslicki* noted in the context of STAA, "the protection afforded by the statute is not unlimited."[34] Under the STAA, an employee's refusal to operate "must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public."[35] In *Cieslicki*, we also took care to note that the ruling did not mean that an impaired worker can never be disciplined, for example, in a situation where the employee voluntarily chose to become impaired.[36]

We reiterate our conclusion in *Cieslicki* that Section 20109(b)(1) of the FRSA "does not require that a condition be 'work-related' or state that the condition cannot relate to an employee's physical condition."[37] Consistent with this conclusion, we hold that an employee impaired by an illness can create a hazardous safety or security condition under the FRSA. Depending on the circumstances of the particular case, a worker impaired by illness, like a worker impaired by alcohol or like a faulty or unsafe piece of equipment or line of track, could present a danger or threat of serious harm or injury to the worker, to his or her colleagues, and to the public. To hold otherwise could implicitly incentivize impaired employees to work despite the risk of causing great harm or injury to themselves or those around them, for fear of discipline. In light of Section 20109(b)(1)'s broad and general language, the overarching purposes of the FRSA, and our precedent in the same and analogous contexts, we hold that reporting, or refusing to work because of, a

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[32] *Compare* 49 U.S.C. § 20109(b)(1)(A) (protecting an employee for "reporting, in good faith, a hazardous safety or security condition") *and* 49 U.S.C. § 20109(b)(1)(B) (protecting an employee for "refusing to work when confronted by a hazardous safety or security condition") *with* 49 U.S.C. § 31105(a)(1)(B)(ii) (protecting an employee who refuses to operate a vehicle because of the fear of injury because of "**the vehicle's** hazardous safety or security condition" (emphasis added)).

[33] *Cieslicki*, ARB No. 2019-0065, slip op. at 7-8 (collecting cases).

[34] *Id.* at 8.

[35] *Id.* (internal citations and quotations omitted).

[36] *Id.* at 9.

[37] *Id.* at 6.

personal, non-work related illness may constitute protected activity under Section 20109(b)(1) of the FRSA.

Although there is the possibility that a personal, non-work related illness could, under certain circumstances, create a hazardous safety or security condition, we do not opine on whether Ingrodi's illness created such a condition. Additionally, we do not opine on whether Ingrodi reported[38] and/or notified CSX of[39] the purported hazardous safety or security condition, as required by the FRSA.

Based on the current record, the evidence shows that Ingrodi initially communicated that he was sick and could not work, and that the treating emergency room doctor ordered him to remain off work for two days (but only later communicated that he explicitly believed his illness prevented him from safely conducting a train). Accordingly, we remand the matter to the ALJ to further develop the record, as reasonably necessary, and determine whether Ingrodi's non-work-related illness, and concomitant refusal to work, constituted a "hazardous safety or security condition" that is protected activity under FRSA. In reaching this determination, the ALJ should consider evidence concerning, for example, the nature and extent of Ingrodi's illness and symptoms, the nature of the work he was expected or could have performed, and the impact his illness and symptoms would have had on his ability to perform that work.

In addition, the ALJ must determine on remand whether Ingrodi's communication to CSX satisfied the notice or reporting requirements of FRSA Section 20109(b)(1). These issues present factual or legal questions that should be resolved by the ALJ on remand in light of our holding in *Cieslicki*.

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38 49 U.S.C. § 20109 (b)(1)(A).

39 49 U.S.C. § 20109 (b)(1)(B), (b)(2)(C).

CONCLUSION

For the foregoing reasons, we **VACATE** and **REMAND** the ALJ's decision for further proceedings consistent with our Order.

SO ORDERED.

James A. Haynes, *Administrative Appeals Judge*, concurring:

I concur with the result. This matter should be remanded for further proceedings.