U.S. Department of Labor

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

In the Matter of:

KERVIN JEANTY,

COMPLAINANT,

v.

LILY TRANSPORTATION CORPORATION,

RESPONDENT.

ARB CASE NO. 2019-0005

ALJ CASE NO. 2018-STA-00013

DATE: May 13, 2020

Appearances:

For the Complainant:
Kervin Jeanty; *pro se*; Newburgh, New York

Before: Heather C. Leslie, James A. Haynes, and James D. McGinley, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended. 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2019) (the STAA's implementing regulations). Kervin Jeanty filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that Respondent Lily Transportation Corporation (Lily) violated the STAA by terminating his employment after he allegedly refused to drive a commercial vehicle in violation of Federal Motor Carrier Safety Administration (FMCSA) regulations. Following a hearing, a Department of Labor Administrative Law Judge (ALJ) ruled that Jeanty had not met his burden to prove that he had engaged in protected activity under the STAA, and denied his complaint.

Jeanty appealed the ALJ's decision to the Administrative Review Board (ARB or Board). Jeanty argues that the evidence established he did engage in protected activity. Jeanty also requests the Board to reopen the record, issue him a third-party subpoena *duces tecum*, and consider a new form of retaliation for the first time on appeal. For the following reasons, we affirm the ALJ's decision and deny Jeanty's complaint.[1]

BACKGROUND[2]

Jeanty began working as a commercial tractor-trailer driver for Lily, a logistics and delivery company, in July 2016. Jeanty was based at a facility operated by Lily in Stormville, New York (the Stormville Yard). Jeanty worked for Lily for approximately twelve weeks before the suspension precipitating this case. Jeanty spent the first six weeks of his employment in training, and therefore only spent approximately six weeks on the road as a driver for Lily.

Lily assigned Jeanty to make "runs" from the Stormville Yard to various delivery locations, often in New York City. Each run followed a typical sequence of events. First, Jeanty reported to the Stormville Yard to receive a delivery slip informing him where the delivery was going and which trailer to take. Jeanty then located the trailer he was assigned, hooked the trailer to his truck, "strapped" the load in the trailer, and performed the required pre-trip inspection of the tractor-trailer. After completing this pre-trip process, Jeanty made the delivery and returned with his tractor-trailer to the Stormville Yard. Jeanty typically made two runs a day.

On September 30, 2016, Jeanty completed a first run to Brooklyn and returned to the Stormville Yard around 11:00 a.m. According to Jeanty, he then told Andre Duncan, Lily's Operations Manager at the Stormville Yard, that he was ill or fatigued[3] and asked if he could go home.[4] Duncan allegedly responded that there were no other drivers available to cover Jeanty's next run, and Jeanty admittedly

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[1] Lily did not file a brief in response to Jeanty's appeal, or otherwise enter an appearance before the Board.

[2] The facts are based on the ALJ's detailed delineation of the parties' stipulated facts and the testamentary and documentary evidence presented at the hearing. Decision and Order Dismissing Complaint (D. & O.) at 3-21.

[3] Jeanty's testimony was not clear as to precisely what he told Duncan. At one point in his testimony, Jeanty stated that he told Duncan he was "not feeling well." Hearing Transcript (Hearing Tr.) at 30. He later testified that he told Duncan he was "ill and/or fatigued." *Id.* at 33.

[4] Duncan testified that he did not recall Jeanty reporting that he was not feeling well, was ill, or was fatigued. A resolution as to this factual dispute is not necessary in light of our holding.

agreed to make a second run to Brooklyn after taking a lunch and rest break. There is no indication that Jeanty complained about being ill or fatigued at any other point during the remainder of the day on September 30.

When Jeanty finished his break around 12:15 p.m., he began the pre-trip process for his second run. Jeanty and Duncan both testified that the pre-trip process should typically take forty-five minutes. However, on September 30, 2016, Jeanty took more than twice that amount of time getting ready to depart.

First, Jeanty claimed he suffered delays trying to connect his truck to the assigned trailer. Jeanty caused two "high hitches," a situation in which the "kingpin" of the trailer gets stuck behind the "fifth wheel" of the truck. The parties agreed a high hitch is a precarious situation and can cause severe damage to the tractor and trailer. According to Duncan and Jack Poor, Lily's Regional Vice President of Operations, high hitches are caused by driver neglect and can be avoided so long as the driver follows proper procedures.

Jeanty testified it took him somewhere between twenty-five and forty minutes to extricate himself from the two high hitches. Jeanty did not alert anyone to his connection problems at the time they occurred or ask for help to get out of the high hitches, although Poor testified it was procedure for drivers to call dispatch for help if a high hitch occurred. Poor testified that with help, Jeanty could have remedied a high hitch in as little as five minutes.

Jeanty testified he finally had his tractor-trailer connected and his load strapped by 1:15 p.m. Jeanty then proceeded to get fuel. Jeanty testified that he was delayed in fueling because there was no fuel fob with the truck and because there were other trucks in line at Lily's lone fuel pump.

Jeanty still had not departed for his second run as of 2:00 p.m. At that point, Jeanty reported to Duncan that he believed he no longer had time to make the delivery and return to the Stormville Yard without violating the FMCSA's hours-of-service rules.[5] Duncan reviewed Jeanty's hours for the day, and determined he did still have time to make the run. When Jeanty continued to insist he could not make the run in time, Duncan suspended him. After Duncan consulted with Poor, Jeanty's suspension was changed to a termination.

JURISDICTION AND STANDARD OF REVIEW

[5] As discussed in more detail in Section 1.B., *infra*, the hours-of-service rules limit how many hours a driver of a commercial vehicle may drive during a work shift. 49 C.F.R. § 395.3.

The Secretary of Labor has delegated to the ARB authority to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020). The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. 29 C.F.R. §1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted). In addition, we uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." *Jacobs*, ARB No. 17-0080, slip op. at 2 (quotations omitted).

DISCUSSION

1. Jeanty Did Not Engage in Protected Activity

The STAA provides than an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity. 49 U.S.C. § 31105(a)(1); 29 C.F.R. §1978.102(a). Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121.

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014-STA-00037, slip op. at 3 (ARB Oct. 31, 2019). If the employee does not prove one of these requisite elements, the entire claim fails. *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 2011-0032, ALJ No. 2008-STA-00011, slip op. at 5 (ARB Dec. 19, 2012) (citation omitted).

As relevant to this appeal, a complainant may engage in protected activity under the STAA's "refusal to drive" clause by refusing to operate a commercial vehicle because the operation would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security. 49 U.S.C. § 31105(a)(1)(B)(i).[6] To be protected, a complainant must show that he

[6] A complainant may also engage in protected activity by filing a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A). The ALJ's D. & O. focused exclusively on the "refusal to drive" clause, and did not address whether Jeanty's conduct constituted protected activity under

refused to drive based on a subjectively and objectively reasonable belief regarding the existence of an actual or potential violation.[7] *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 2011-0019, ALJ No. 2010-STA-00022, slip op. at 7 (ARB Nov. 28, 2012) (citing *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 2010-0036, ALJ No. 2009-STA-00061, slip op. at 6 (ARB Nov. 16, 2011)); *see also Mauldin v. G & K Servs.*, ARB No. 2016-0059, ALJ No. 2015-STA-00054, slip op. at 4 n.12 (ARB June 25, 2018). The "subjective" component of the reasonable belief test is satisfied by showing that the complainant actually believed, in good faith, that the conduct he complained of constituted a violation of relevant law. *Gilbert*, ARB No. 11-0019, slip op. at 7; *Dick v. Tango Transp.*, ARB No. 2014-0054, ALJ No. 2013-STA-00060, slip op. at 7 (ARB Aug. 30, 2016). Objective reasonableness is "evaluated on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Gilbert*, ARB No. 11-0019, slip op. at 7 (quotation omitted); *accord Tango Transp.*, ARB No. 14-0054, slip op. at 7 (citation omitted).

The ALJ determined that Jeanty's refusal to make a second run on September 30, 2016, did not constitute protected activity under the STAA's "refusal to drive" clause. The ALJ's decision is well-reasoned, comprehensive, and amply supported by the evidence and her credibility determinations. Accordingly, we affirm the ALJ's decision.

A. Refusal to Drive Due to Illness and/or Fatigue

The first instance of potential protected activity considered by the ALJ was Jeanty's initial request not to make a second run on September 30, 2016, because he

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the "complaint" clause. Jeanty did not identify this as a point of error by the ALJ or an issue for the Board to consider on appeal.

[7] Some Courts of Appeals have held that a refusal to drive claim under Section 31105(a)(1)(B)(i) requires the complainant to establish an actual violation of applicable rules or regulations for his conduct to be protected. *See, e.g., Koch Foods, Inc. v. Sec'y of Labor*, 712 F.3d 476, 486 (11th Cir. 2013); *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 209 (4th Cir. 2011). However, the Board has held that proof of an actual violation is not necessary, and a complainant's actions may be protected as long as he had a subjectively and objectively reasonable belief regarding the existence of an actual or potential violation. *Gilbert*, ARB No. 11-0019, slip op. at 7; *Mauldin*, ARB No. 16-0059, slip op. at 4 n.12. And, while the Eleventh Circuit disagreed with the Board's approach in *Koch Foods*, as we recognized in *Mauldin* we are not bound by the Eleventh Circuit's opinion as this case falls within the ambit of a different circuit. *See Mauldin*, ARB No. 16-0059, slip op. at 4 n.12. Below, the ALJ considered whether driving under the circumstances would have resulted in an actual violation, *and,* alternatively, whether Jeanty had a subjectively and objectively belief of violation. In accordance with our precedent, we limit our analysis to whether Jeanty's belief was subjectively and objectively reasonable under the circumstances.

was ill or fatigued.[8] D. & O. at 24-25. We agree with the ALJ that Jeanty's statement that he was "ill and/or fatigued" was too vague to be protected activity under the STAA's refusal to drive clause.

The FMCSA regulations provide, in relevant part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3. Therefore, Jeanty had to prove by a preponderance of the evidence that he refused to drive because he reasonably believed that his ability or alertness was so impaired, or was likely to become so impaired, that it would have been unsafe to make the second run.

Yet, there is no evidence that Jeanty told Duncan that he thought he could not drive, or that his alleged illness or fatigue could impact his ability to drive his vehicle safely. Jeanty also apparently did not elaborate on or give context for his condition or explain the source or extent of his "illness and/or fatigue." *See* D. & O. at 25 n.36; Hearing Tr. at 30, 33. Furthermore, there is no evidence Jeanty ever raised his alleged illness or fatigue again later in the day on September 30, even when he was in a dispute with Duncan over his subsequent refusal to drive based on the hours-of-service rules.[9]

Under these circumstances, we agree with the ALJ that Jeanty's assertion of "illness and/or fatigue," without more, did not suggest his "ability or alertness [was] so impaired, or so likely to become impaired through illness or fatigue . . . as to

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[8] The ALJ stated in her D. & O. that it was not clear whether Jeanty was actually asserting a refusal to drive claim based upon illness or fatigue. Even so, the ALJ elected to consider the issue "in the interest of completeness." D. & O. at 24 n.35. Jeanty's position remains unclear in his appeal. Although he makes brief reference to his alleged illness or fatigue, he is not clear whether he is arguing his assertion of illness or fatigue was a form of protected activity. Nevertheless, we will consider the issue, as the ALJ did.

[9] Jeanty suggests that the two high hitches he caused while preparing for his second run were an "obvious indication that [he] was ill and or [sic] fatigued." Complainant's Petition for Review (Petition) at 3. Yet, Jeanty never asked for help to get out of the high hitches. *See* D. & O. at 30. If Jeanty really was sick or fatigued, we would expect him to have asked for help when he ended up in a high hitch situation and/or to have reiterated his illness or fatigue to Duncan. Instead, he chose to exert himself further by getting in and out of his truck while trying to resolve the situation himself.

make it unsafe for him to" drive and, therefore, was not protected under the STAA. *See* 49 C.F.R. § 392.3; *Bates v. USF Reddaway, Inc.*, ARB No. 2007-0086, ALJ No. 2005-STA-00029, slip op. at 3-5, 9-10 (ARB May 20, 2009) (finding driver's statements that he "had several unscheduled stops due to illness" on his previous run and that he was "sick" and "not feeling very well" were insufficient where driver never explained to employer "that he was too sick to drive safely the run he refused"); *Wrobel v. Roadway Express, Inc.*, ARB No. 2001-0091, ALJ No. 2000-STA-00048, slip op. at 3, 5 (ARB July 31, 2003) (finding that driver's refusal to drive after telling dispatcher he was "sick," without further elaboration, did not communicate protected activity to employer); *Stout v. Yellow Freight Sys., Inc.*, ALJ No. 1999-STA-00042, slip op. at 8 (ALJ Dec. 3, 1999), *aff'd* ARB No. 2000-0017 (ARB Jan. 31, 2003) ("It is not enough for the employee to simply state that he is not feeling well or that he is 'sick and tired.' The comments must be explicit enough to convey to Respondent that the refusal to continue to drive was because the complainant's ability to do so was impaired.").

In addition, as the ALJ noted, Jeanty admitted that he ultimately agreed to make the second run, despite being ill or fatigued. D. & O. at 5. We agree with the ALJ that Jeanty cannot engage in protected activity under the STAA's "refusal to drive" clause when he did not, in fact, actually refuse to drive. *See Calhoun v. Dep't of Labor*, 576 F.3d 201, 209 (4th Cir. 2009); *Williams v. CMS Transp. Servs., Inc.*, No. 1994-STA-00005, slip op. at 3 (Sec'y Oct. 25, 1995).

B. Refusal to Drive Due to an Hours-of-Service Violation

The second instance of potential protected activity considered by the ALJ was Jeanty's refusal to drive on the afternoon of September 30 based on the FMCSA hours-of-service rules. D. & O. at 25-31. The hours-of-service rules set limits on the number of hours a driver of a commercial property-carrying vehicle can legally drive. In particular, the rules provide that a driver "may drive only during a period of 14 consecutive hours after coming on duty . . . ." 49 C.F.R. 395.3(a)(2). The driver may continue to work after reaching the 14-hour limit, but may not drive again until he has had at least ten hours off duty. *See id.*; D. & O. at 17-18. By 2:00 p.m., Jeanty had five hours and twenty-four minutes remaining under the 14-hour driving limit.[10] Jeanty claims he refused to make the second run because he could not have finished his drive in that amount of time.

[10] There was conflicting evidence at the hearing as to the time Jeanty had remaining under the 14-hour limit as of 2:00 p.m. Although Jeanty did not recall what time he began his shift on September 30, 2016, he testified inconsistently that it took as little as five or as many as eight hours for him to finish his first run. Hearing Tr. at 31-32, 40, 45-46. The ALJ weighed Jeanty's testimony against the testimony of Lily's witnesses and the documentary evidence admitted into the record, including an electronic driver log, and determined that Jeanty had been on duty for five hours and thirty-six minutes when he finished his first run at 11:00 a.m. D. & O. at 26-27. Therefore, three hours later at 2:00 p.m. Jeanty had been on

The ALJ determined that Jeanty's professed belief that his second run would have violated the hours-of-service rules was not subjectively or objectively reasonable, and therefore did not constitute protected activity under the STAA. We agree.

i. Subjective Belief

The ALJ determined that Jeanty's professed belief that he was going to violate the hours-of-service rules if he made the second run was not held in good faith. *See Tango Transp.*, ARB No. 14-0054, slip op. at 7 ("To prove subjective belief, a complainant must prove that he held the belief in good faith."). After finishing his first run at 11:00 a.m., Jeanty took nearly three hours before reporting that he could no longer make the second run. The ALJ weighed the evidence and concluded that Jeanty purposefully delayed his departure because he did not want to make a second delivery that day, and the hours-of-service rules were just a fabricated excuse to achieve his desired result. Substantial evidence supports the ALJ's conclusion.

In assessing the three hour delay, the ALJ found, in relevant part:

> Respondent has established there are specific time periods for drivers to complete tasks prior to beginning a delivery. I credit Mr. Duncan and Mr. Poor's testimony it takes 45 minutes to hook the trailer and strap the load and up to 15 minutes to get fuel, if fueling is necessary. On September 30, it took Complainant 2 hours to complete these tasks. It would not have taken that period of time had Complainant notified Mr. Duncan that he was in a high hitch situation. Complainant did not follow Respondent's established policy because he failed to notify anyone that he had a high hitch when it occurred. If he had notified Mr. Duncan, assistance would have been provided, it would have taken less time to correct the first high hitch, and very likely would have avoided the alleged second high hitch. Complainant's actions in causing one and possibly two high hitch situations by not following procedure for hooking the truck significantly contributed to the delay in his departure. Compounding this failure was Complainant's failure to notify Respondent of his high hitch so he could

duty eight hours and thirty-six minutes and could only drive for the next five hours and twenty-four minutes before reaching the 14-hour limit. Substantial evidence supports the ALJ's findings and her calculation of Jeanty's hours on September 30, 2016.

> have been assisted in correcting the situation, which further delayed his departure and compressed the time he had available under the hours of service regulation to complete the second delivery.

D. & O. at 30 (footnotes omitted). In addition, the ALJ considered the fact that Jeanty took forty-five minutes or more for lunch, when a shorter break could have put him back on the road sooner. *Id.* at 30 n.45. The ALJ also noted Jeanty's history of "difficulty with following company policy" (*Id.* at 30 n.47), and made a credibility determination that Jeanty was "influenced by his frustration that Respondent was not paying him the wages he believed he was promised." *Id.* at 22-23. In fact, Jeanty reiterated on appeal that he did not think he was getting paid what he thought he was promised. Complainant's Brief in Support of Appeal (Compl. Br.) at 7 (". . . I believe Lily perceived, that I was going to report and complain about going over hours of service, as well as the fact that, they were not paying me what, they said I would be making ($1500-$2,000 a week" (emphasis original)). We agree with the ALJ that the foregoing evidence demonstrates Jeanty purposefully delayed departing for his second run and that he was not, in good faith, concerned with an hours-of-service violation.[11]

On appeal, Jeanty disputes the ALJ's assessment of the legitimacy (or lack thereof) of his delay. Jeanty claims his high hitches were legitimately and inadvertently caused by his alleged fatigued. Petition at 3. Yet, Jeanty's alleged fatigue does not excuse his decision to not ask for help to resolve the high hitches. As the ALJ found, substantial evidence demonstrates that had Jeanty asked for assistance in accordance with policy, "it would have taken less time to correct the first high hitch, and very likely would have avoided the alleged second high hitch." D. & O. at 30. Even if Jeanty was fatigued, he should have asked for help to avoid an unnecessary, lengthy delay.

Jeanty also argues that Duncan's earlier statement at 11:00 a.m. that there were no other drivers available to cover Jeanty's second run meant that there was no one available to help Jeanty extricate himself from the high hitches, even if he had asked for help. Petition at 3. However, that no driver was available to make a run does not mean that no one was available to assist Jeanty, for a few minutes, to get out of a high hitch or help him get a proper connection. To the contrary, Poor testified help was always available in the yard for issues like a high hitch. D. & O.

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[11] There was also some evidence and testimony presented at the hearing that Jeanty may have returned to dispute the hours-of-service issue a second time at 3:00 p.m., and was not suspended until that time. D. & O. at 28. It is not clear what Jeanty may have been doing during this extra hour. If Jeanty was in fact still trying to prepare for his run or otherwise remained in the Stormville Yard without departing for another hour, this would make his delay even more obviously purposeful and unreasonable.

at 20. The ALJ credited Poor's testimony, as it was undisputed at the hearing. D. & O. at 27 n.37. We find no reason to upset the ALJ's credibility determination.

Finally, Jeanty attempts to justify his delay in getting fuel by noting that there were two drivers in front of him in line at the fuel pump. Petition at 6. He testified to this at the hearing, but the ALJ did not accept Jeanty's explanation and time estimates. Instead, the ALJ credited the testimony from Duncan and Poor as to how long Jeanty's pre-trip preparation, including fueling, should have taken. D. & O. at 30. Jeanty asks us to reweigh the evidence and upset the ALJ's credibility determinations, which we will not do. *See Buie*, ARB No. 19-0015, slip op. at 5.

ii. Objectively Reasonable Belief

The ALJ also found that Jeanty's professed belief that he could not complete his second run without violating the hours-of-service rules was not objectively reasonable. Again, we agree.

First, the ALJ credited the testimony of Duncan and Poor that Jeanty could have made a delivery to Brooklyn and returned to the Stormville Yard in the five hours and twenty-four minutes he had remaining to drive under the hours-of-service rules as of 2:00 p.m. D. & O. at 31. Jeanty argues this finding was in error in light of evidence showing a round trip to Brooklyn could take up to seven hours, depending on factors like traffic getting worse after 2:00 p.m. Petition at 2; Compl. Br. at 2. To be sure, the ALJ did find that "it *could* possibly take up to seven hours depending upon several potential, but uncertain, factors to drive from Respondent's Stormville, NY facility to Brooklyn and back." D. & O. at 29 (emphasis original). Even so, substantial evidence supports the ALJ's conclusion that Jeanty also *could* have completed the run without violating the hours-of-service rules. Indeed, Jeanty's first run to Brooklyn on the morning of September 30 took only five hours and thirty-six minutes, just a few minutes more than the amount of time Jeanty had remaining as of 2:00 p.m. to make a second run to Brooklyn. *Id.* at 26-27.

More importantly, though, the ALJ also concluded that even if Jeanty hit the 14-hour limit mid-run because of traffic or other delays, he could have called Lily for a relief driver to avoid an hours-of-service violation. *Id.* at 31. Several witnesses testified it was the company's policy to dispatch relief drivers to pick up and complete the run for any driver who requested one upon reaching his hours-of-service limit. *Id.* at 11, 14, 18, 21. Because Jeanty could have availed himself of this policy, we agree with the ALJ that it was not reasonable for him to believe he would have violated the hours-of-service rules.

Jeanty argues on appeal that he frequently exceeded the 14-hour limit without comment or discipline from Lily. Compl. Br. at 4. Although not clear, Jeanty appears to be suggesting this proves Lily was not actually in the practice of

sending relief drivers to avoid hours-of-service violations, or that Lily expected him to complete the runs without asking for relief. Yet, there is no evidence that Jeanty ever requested a relief driver when he hit the 14-hour limit, or that Lily would not have supplied a relief driver had he asked for one. To the contrary, there was consistent testimony from witnesses that Lily wanted its drivers call for relief if they hit the driving limit, even if drivers did not always comply. D. & O. at 11, 14, 18, 21. The fact that Lily may not have enforced this relief policy by disciplining drivers who violated it does not mean the policy was not actually available to allow drivers to avoid a violation.

Jeanty also argues that Lily did not have relief drivers available on September 30, 2016, based on Duncan's statement at 11:00 a.m. that there were no other drivers available at that time to cover Jeanty's second run. Compl. Br. at 3. Yet, a relief driver, if one turned out to be necessary, would not have needed to be available until 7:24 p.m.[12] It was not reasonable for Jeanty to conclude that the lack of a driver to cover a complete run at 11:00 a.m. meant there would not be a driver available to relieve him for whatever portion of the run he had remaining more than eight hours later.

Finally, Jeanty faults Duncan for not explicitly telling Jeanty a relief driver would be available when Jeanty expressed his concern over the hours-of-service rules. Compl. Br. at 3. Yet, Jeanty has not cited any evidence or made any argument suggesting that he was not aware Lily would supply relief driers in the event he reached his driving limit.[13] That Duncan did not explicitly remind Jeanty of this policy does not make Jeanty's professed belief that he would violate the hours-of-service rules reasonable.

Therefore, we agree with the ALJ that Jeanty did not engage in protected activity under the STAA.

2. Jeanty's Request to Reopen the Record to Subpoena Additional Records

On appeal, Jeanty also requests the opportunity to reopen the record to submit a subpoena to Lily's customer. Compl. Br. at 7. According to Jeanty, Lily failed to retain and/or produce all of its records reflecting Jeanty's drive times, which prevented him from establishing each instance he exceeded the hours-of-service rules as a driver for Lily or firmly establishing the time he began his shift on September 30. *Id.* at 5-7. Jeanty apparently hopes to collect that missing

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[12] With five hours and twenty-four minutes remaining at 2:00 p.m., Jeanty would have reached his hours-of-service limit at 7:24 p.m.

[13] In fact, on a previous occasion in early September 2016, when Jeanty allegedly complained about not being given a sufficient break period under FMCSA regulations, Lily supplied a replacement driver to make a run for Jeanty. D. & O. at 7, 10.

information from Lily's customer, although he has not articulated why he expects the customer would have information concerning his start, stop, and drive times.

Jeanty did not request the subpoena until just five days before the scheduled hearing date[14] and well after the discovery period closed. *See* March 2, 2018 Pre-Hearing Conference Transcript (Mar. 2 Tr.) at 9-10. Jeanty did not make a written request for the subpoena (29 C.F.R. § 18.56(a)(1)) or file a written motion to compel regarding Lily's alleged failure to produce relevant documents (29 C.F.R. § 18.33(a)(1)). The ALJ did not issue Jeanty the subpoena because of the belatedness of his request. Mar. 2 Tr. at 10.

ALJs have wide discretion to limit the scope of discovery and will be reversed only when their rulings are arbitrary or an abuse of discretion. *Hibler v. Exelon Generation Co., LLC*, ARB No. 2005-0035, ALJ No. 2003-ERA-00009, slip op. at 23-24 (ARB Mar. 30, 2006); *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 2003-0026, ALJ No. 1996-CAA-00008, slip op. at 5-6 (ARB Sept. 29, 2004); *Hasan v. Burns & Roe Enter., Inc.*, ARB No. 2000-0080, ALJ No. 2000-ERA-00006, slip op. at 3-4 (ARB Jan. 30, 2001). Jeanty has not argued why the ALJ's rejection of his request for a subpoena under the circumstances was arbitrary or an abuse of discretion. Nor has Jeanty explained why he waited until the eve of the hearing to make his request, why his request did not comply with the rules of procedure, or why he did not or could not make his request during the regular discovery period.

Although Jeanty is afforded certain latitudes as a self-represented litigant, Jeanty is not excused from the rules of practice and procedure applicable to this proceeding merely because of his pro se status. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) ("[T]his court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants."); *Ghazali v.* Moran, 46 F.3d 52, 54 (9th Cir. 1995) ("[P]ro se litigants are bound by the rules of procedure."). An ALJ "must accord a party appearing *pro se* fair and equal treatment, but a *pro se* litigant cannot generally shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." *Pik v. Credit Suisse, AG*, ARB No. 2011-0034, ALJ No. 2011-SOX-00006, slip op. at 4-5 (ARB May 31, 2012) (quotation omitted). Absent any explanation for his belated request for a subpoena, we find the ALJ did not abuse her discretion when she rejected Jeanty's request.[15]

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[14] The hearing date was temporarily postponed at the last minute due to inclement weather.

[15] In addition, the records Jeanty hopes to obtain are unlikely to help his case. That Jeanty may have frequently exceeded the hours-of-service rules without complaint and without requesting relief in accordance with company policy bolsters the ALJ's conclusion that Jeanty did not have a good faith concern with violating the hours-of-service rules on September 30, 2016. Likewise, even if Jeanty uncovered evidence showing he had fewer than five hours and twenty-four minutes remaining as of 2:00 p.m. on September 30, 2016,

3. Jeanty's New Claim of an Additional Act of Retaliation

Jeanty also raises, for the first time on appeal, a separate instance of alleged retaliation which occurred weeks before his suspension on September 30. Specifically, Jeanty argues Lily's issuance of a "last chance agreement" on September 7, was an independent act of retaliation in response to Jeanty insisting upon taking a legally mandated rest break. Compl. Br. at 4.

The sole justiciable issue identified in Jeanty's request for hearing, at the various pre-hearing conferences, and at the hearing itself, was whether the September 30 suspension (and ensuing termination) was retaliatory. In fact, Jeanty expressly disavowed all other issues, except as relevant background. February 2, 2018 Pre-Hearing Conference Transcript at 13 ("[W]hat this complaint is about is September 30th. Anything prior to that is just to further support my case."). We will not consider a new claim raised for the first time on appeal, particularly in light of Jeanty's disavowal below. *Mauldin*, ARB No. 16-0059, slip op. at 6; *Chief, Div. of Enforcement, Office of Labor-Mgmt. Standards v. Local 12, American Fed. of Gov't Employees*, ARB Nos. 2013-0094, 2014-0081, ALJ No. 2013-SOC-00001, slip op. at 10 n.4 (ARB Sept. 24, 2014); *Honardoost v. Peco Energy Co.*, ARB No. 2001-0030, ALJ No. 2000-ERA-00036, slip op. at 6 n.3 (ARB Mar. 25, 2003).

4. Supposed "Contradictions" in the Record

Finally, Jeanty points to supposed "contradictions" in the evidence and testimony adduced at trial in an effort to cast doubt on the ALJ's findings. However, none of the "contradictions" are relevant or material to the issue of Jeanty's protected activity or the outcome of this case.

Jeanty cites a "contradiction" between Duncan's recollection at the hearing that Jeanty did not tell him about his high hitches when Jeanty refused the load at 2:00 p.m., and Poor's recollection that Duncan told him that Jeanty did in fact eventually report the high hitch situations. Petition at 5; Compl. Br. at 1-2. Yet, Jeanty admitted at the hearing he did not report the high hitches at the time they occurred, when help could have been provided. Hearing Tr. at 81. This contributed to the ALJ's finding that Jeanty purposefully delayed his departure to avoid a second run. Whether or not Jeanty *later* reported the high hitches is immaterial to this analysis.

Jeanty also argues there were "contradictions" between Lily's witnesses regarding whether Lily let its drivers exceed the 14-hour hours-of-service limit

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it would not alter the ALJ's finding that he could have asked for a relief driver to avoid an hours-of-service violation.

without discipline, and whether an exception could apply to the limit. Compl. Br. at 2-3, 4-5. That Jeanty may have exceeded the limit without discipline does not alter the conclusion that relief drivers were nevertheless available to avoid violations if drivers chose to take advantage of them.

Therefore, these "contradictions" do not alter our decision.

CONCLUSION

For the foregoing reasons, we find the ALJ properly concluded that Jeanty did not engage in protected activity under the STAA. Accordingly, the ALJ's decision in this matter is **AFFIRMED** and Jeanty's complaint is hereby **DENIED**.

SO ORDERED.