



Issue Date: 28 December 2011

Case No.: **2010-STA-42**

In the Matter of:

SIDNEY CORYELL,
Complainant

v.

ARKANSAS ENERGY SERVICES, LLC,
Respondent

Appearances:

Sidney Coryell, *Pro Se*
Conway, Arkansas

Leslie Michelle Chadwick, Lay Representative
Hot Springs, Arkansas
For the Complainant

Robert M. McHenry, Esq.
McHenry & McHenry
Little Rock, Arkansas
For the Respondent

Before:

Alice M. Craft
Administrative Law Judge

**DECISION AND ORDER
DISMISSING THE COMPLAINT**

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act (“STAA”), as amended.¹ The STAA and its implementing regulations² protect employees from discharge, discipline and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant, Sidney Coryell, alleges

¹ 49 U.S.C. § 31105 (2009).

² 29 C.F.R. Part 1978 (2011).

that he was terminated from his position as a truck driver with the Respondent, Arkansas Energy Services, LLC, after filing a complaint with the United States Department of Transportation alleging that the company committed violations of commercial motor vehicle safety rules.

STATEMENT OF THE CASE

On September 21, 2009, Mr. Coryell filed a complaint with the Occupational Safety and Health Administration of the Department of Labor (“OSHA”). He alleged that he had been unjustly discharged by Arkansas Energy Services “for being suspected of filing an over the road safety complaint” with the Department of Transportation (“DOT”).

On March 30, 2010, the Regional Supervisory Investigator for OSHA (“Investigator”) issued findings on the complaint on behalf of the Secretary of Labor. Following a formal investigation, the Investigator concluded that the Secretary had found no merit to the allegation that Arkansas Energy Services violated the STAA. More specifically, the Investigator opined that “[a] preponderance of the evidence indicates Complainant’s protected activity was not a contributing factor in his termination.” Accordingly, the Investigator dismissed Mr. Coryell’s complaint.

By letter dated April 15, 2010, Mr. Coryell appealed the OSHA findings and requested a formal hearing on his claim. The letter appears to have been transmitted by facsimile to the Office of Administrative Law Judges (“OALJ”) on May 4, 2010.

I conducted a hearing on this claim on December 15-16, 2010, in Little Rock, Arkansas. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.³ Complainant’s Exhibits (“CX”) 2-4, 4A, 5-6, 8, and 10, as well as Respondent’s Exhibits (“RX”) 1-2, 2A-2E, and 3-4 were admitted into evidence in full. CX 7 was also admitted into evidence, with the exception of pages 5-6 and 11-12, which were excluded. Transcript (“Tr.”) at 438. Similarly, CX 9 was admitted except for pages 5-8. Tr. 439. CX 1, 4B, 11 and 12 were excluded from evidence in their entirety. RX 2F was also excluded from evidence. Because Mr. Coryell is not represented by legal counsel, I explained the nature of the proceedings to him. Tr. 6-8. He confirmed that he understood his rights, his burden of proof, and the remedies available to him. Tr. 7-8. The witnesses were separated during the hearing and, therefore, did not hear each others’ testimony. Tr. 5. The record was held open for 60 days after the hearing to allow the parties to submit closing briefs. Both parties submitted briefs, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearing, and the arguments of the parties on the merits of the claim.

³ 29 C.F.R. Part 18 (2011).

ISSUES

The issues in this case are whether Arkansas Energy Services violated the STAA when it terminated Mr. Coryell's employment, and if so, what remedies should be awarded.

APPLICABLE STANDARDS

In relevant part, the employee protection provision of the STAA, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, provides as follows:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.⁴

This employee protection provision was enacted “to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.”⁵

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121(b).⁶ Under the AIR 21 standard, complainants must initially make a *prima facie* showing by a “preponderance of the evidence” that a protected activity was a “contributing factor in the unfavorable personnel action alleged in the complaint.”⁷ If a complainant makes this *prima facie* showing, an employer can only overcome that showing if it demonstrates “by clear and convincing evidence, that [it] would have taken

⁴ 49 U.S.C. § 31105(a)(1)(A).

⁵ *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

⁶ 49 U.S.C. § 31105(b)(1).

⁷ 49 U.S.C. § 42121(b)(2)(B)(i). *See also* 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) (“It is the Secretary’s position that the complainant [in an STAA case] must prove by a ‘preponderance of the evidence’ that his or her protected activity ... contributed to the adverse action at issue.”); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 8 (ARB Sept. 15, 2011) (STA).

the same unfavorable personnel action in the absence of [the protected] behavior.”⁸ Thus, in order to prevail on his claim under the STAA, Mr. Coryell must prove the following by a preponderance of the evidence: (1) that his complaint to the DOT was protected activity; (2) that his employer, Arkansas Energy Services, took an adverse employment action against him by terminating his employment; and (3) that his filing of the complaint was a contributing factor in his employer’s decision to terminate his employment.⁹ If Mr. Coryell satisfies this burden, Arkansas Energy Services may avoid liability by demonstrating “by clear and convincing evidence” that it would have terminated Mr. Coryell’s employment even if he had not filed the DOT complaint.¹⁰

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

At the hearing, Mr. Coryell was provided an explanation regarding the nature of the proceedings associated with his claim under the STAA. Tr. 6-8. As stated above, a number of documentary exhibits were admitted into evidence. The parties also presented a number of witnesses to testify in support of their respective cases. Mr. Coryell testified on his own behalf, and also presented the following witnesses in support of his case: Tim Willenberg, Robert Smith, John George, and John Gerke. Arkansas Energy Services presented the following witnesses as a part of its defense: Allan Gregorcyk, Daniel Thomas, William Chapman, James Hargis, and Charles Campbell.

Arkansas Energy Services (“AES”) is a limited liability company registered in the State of Arkansas. The company’s headquarters “yard” is in Damascus, Arkansas, Tr. 93, but the company also has a mailing address for Alice, Texas. See RX 2D-7 to 2D-10. AES was founded in 2007 as a result of the start-up of the gas drilling industry on the Fayetteville shale plate in Arkansas. Tr. 365-366. Allan Gregorcyk, who is the general manager for AES, testified that “Fayetteville shale is a very lucrative area” where drilling companies are seeking to extract natural gas. Tr. 282. The drilling companies include Southwestern Energy, Petrohawk Drilling, and Chesapeake Drilling. Tr. 282, 367. According to James Hargis, who has been employed as a truck driver with the company since 2007, AES is one of several trucking companies that were founded in response to the need for “a lot of professional truck drivers that knew what they were doing.” Tr. 366. Mr. Gregorcyk similarly stated that AES is “one of 30 plus trucking companies [and] our major responsibility is the hauling of water for Southwestern Energy.” Tr. 282. In fact, the majority of AES’s business comes from Southwestern Energy. Tr. 259, 282. Mr. Gregorcyk described his company’s services as follows:

⁸ 49 U.S.C. § 42121(b)(2)(B)(ii). See also 75 Fed. Reg. at 53,550 (“[T]he employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the protected activity.”).

⁹ See *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9; *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, slip op. at 4 (ARB June 29, 2011) (STA); *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 5 (ARB Jan. 31, 2011) (STA).

¹⁰ See *id.*

We have big trucks that are 18 wheelers, we pull vacuum trailers and we haul various types of water, there's shallow ground water, there's flow back water, there's production water. We also hauled mud; oil based mud, water based mud.

Tr. 282-283. He identified "shallow ground water" as a type of water that is obtained "from the well in the early drilling process" and contains "bits and pieces of rock, mud, particles that clog up your pumps." Tr. 293. Conversely, he described "production water" as a "very fine, very pure" type of water that is generated "towards the very end of the whole process on the drilling site." Tr. 287. Unlike shallow ground water or flow back water, production water does not come out of a work pit and does not contain any solid particles. Tr. 288.

According to Daniel Thomas, who is currently a dispatcher for AES, the company receives individual work orders from Southwestern Energy, which are then assigned to drivers. Tr. 343. He testified that "we take the orders from [Southwestern Energy] for trucks and we write them up, give them to the drivers and send the trucks out to the jobs." Tr. 343. The work orders contain all of the information needed for a particular assignment, and a copy is then given to an individual driver. Tr. 112-116, 343. The original work order is kept in the AES dispatch office. Tr. 290. The parties submitted copies of a number of work orders that document the types of assignments given to AES truck drivers. *See* CX 5; RX 3-2 to 3-7, 3-10. These work orders, dated April 7, 2009 to September 16, 2009, indicate that AES's drivers frequently transport water from drilling leases to various disposal sites in Arkansas. The drivers are responsible for loading and transporting several different types of water, including production water, pit water, flow back water, and shallow ground water. CX 5; RX 3-2 to 3-7, 3-10. The truck drivers frequently travel on the back roads of Arkansas, which consist of tight roads and a substantial number of hills. Tr. 93, 253, 370. According to John Gerke, a former sales manager for AES, these routes are "a lot different than driving straight [and] takes a lot more skilled driver to do that." Tr. 253. Mr. Hargis similarly described the road conditions as follows:

Oh, it's extremely different from over the road driving, what we do. We drive on some beat up, narrow roads with no shoulders ... you have to be a professional driver to really be out there and be on your game every day to do this in a professional manner, to not have accidents.

Tr. 370. He also noted that it is impossible for drivers to "set your cruise control" on the roads because of the hills and curves. Tr. 393. He emphasized the importance of being a careful driver on these routes. Tr. 370.

Mr. Coryell was employed as a truck driver with AES on two separate occasions. Tr. 90. He testified that he has driven "professionally over-the-road and local and regional in various different shapes, forms and fashions" since 1998. Tr. 86. Mr. Coryell was initially hired on February 20, 2009, but was terminated on March 11, 2009. CX 4A; RX 2D-10. He was rehired by AES on June 19, 2009, and worked for the company until his employment was terminated on September 17, 2009. CX 4A; RX 2D-7. During

both periods of employment, Mr. Coryell worked as a truck driver hauling “40-foot water trailers that held about 5,000 barrels ... of water.” Tr. 93. He testified that he would load the water from “a big pit that [the drilling companies] just got through drilling for gas and oil and such in the ground, and as a result they’ll have excess water coming out of the ground into [the pit].” Tr. 94. He also transported water from “frack tanks.” Tr. 94. Thus, his job essentially involved loading water at a drilling site and transporting it to a disposal location. Tr. 95. Mr. Coryell testified that his routes included a “variety of road conditions and roadways,” such as a “mixture of two-lane narrow roads, curvy, some interstates.” Tr. 93. He typically worked four days per week, with 12-hour shifts on each day. Tr. 96. During his second period of employment, Mr. Coryell was a truck driver on the night shift. Tr. 97. He was paid between \$15.00 and \$16.00 per hour, plus overtime. Tr. 96.

On March 11, 2009, Mr. Coryell was reported to AES for speeding while departing a disposal site. Tr. 91, 98, 154, 245; RX 2D-1. The written notification of the incident states that he was “reported speeding out of Lancer [disposal]” and the “management at Lancer [disposal] called AES with their [disposal ticket] number to help identify the truck.” RX 2D-1. Mr. Coryell testified that the disposal site notified AES that he was “driving like a jackass and hauling ass off the pad.” Tr. 91. As a result, AES informed Mr. Coryell that “we have no choice but to terminate your employment at this time.” RX 2D-1. The discharge statements filed with the Arkansas Department of Workforce Services indicate that Mr. Coryell violated company safety policies and was terminated for “driving too fast.” RX 2D-9 to 2D-10. He alleged, however, that the complaint against him was not true and described his termination as “unfair.” Tr. 91, 154. In particular, Mr. Coryell opined that AES unfairly refused to investigate the complaint against him. Tr. 154. He therefore admitted that he was angered by his termination from AES. Tr. 154.

Following his termination, Mr. Coryell filed a complaint against AES with the United States Department of Transportation (“DOT”) in March 2009. Tr. 100, 102, 119-120; CX 4. He filed the complaint approximately one week after his termination from AES. Tr. 155-156. In his complaint, Mr. Coryell raised a number of concerns. First, he reported that “[a]t no time while employed [at AES] or prior to employment did [he] ever [receive] a drug test or pre-employment drug test.” CX 4-1. He also noted that AES did not administer drug tests to drivers who were involved in on-the-job accidents. Second, Mr. Coryell reported that he had been required to work for more than 12 hours per day on numerous occasions. CX 4-1. Furthermore, he complained that AES failed to provide adequate training to inexperienced drivers. CX 4-1. At the hearing, Mr. Coryell testified that his main reason for filing the DOT complaint was “[b]ecause I was basically being asked to drive unsafe equipment.” Tr. 100. In particular, he alleged that he had brought up truck safety issues to the AES mechanics, but his concerns were never addressed. Tr. 100. He also reiterated his concern with the company’s drug testing policy:

I was never given a pre-employment drug test or a random or any of that nature, which ... also concerned me. I had also known ... a few drivers that had been involved in accidents that [were] never given a post-accident

test.

Tr. 100-101. On April 2, 2009, the DOT provided written notice to Mr. Coryell acknowledging receipt of his complaint and informing him that an investigation was pending. CX 4-3.

Before the DOT could initiate an investigation, Mr. Coryell was rehired by AES in June 2009. Tr. 99; CX 4A-1; RX 2D-7. He testified that he was rehired on June 16, 2009. Tr. 99. The documents filed by AES with the Arkansas Department of Workforce Services list a rehire date of June 19, 2009. RX 2D-7. Mr. Coryell testified that he was rehired after speaking with Mr. Gerke on two occasions, who agreed to give him a job as a night shift truck driver. Tr. 98. According to Mr. Gerke, Mr. Coryell was rehired because “we were hoping he could work with James [Hargis] and that we could get him cleaned up.” Tr. 246. He testified, however, that it became immediately evident that it was a mistake to rehire Mr. Coryell. Tr. 246, 252. On July 1, 2009, Mr. Coryell received a written warning from AES for an incident involving a trailer at the AES yard. RX 2D-4. The warning indicates that he was asked to move a truck and trailer within the yard so that the truck’s tires could be replaced. RX 2D-4. Mr. Coryell, however, apparently “failed to set the trailer brakes” after parking the truck. RX 2D-4. When a mechanic “jacked up [the] front drive on both sides ... the truck just rolled forward about 40 [feet].” RX 2D-4. Mr. Coryell acknowledged that he received a written warning for this incident. Tr. 106. He alleged, however, that he had secured the trailer brakes before leaving the truck and was therefore not responsible for any subsequent events. Tr. 106, 171. While admitting that he signed the written warning, Mr. Coryell stated that he did so “out of protest because I disagree[d] with it because I was not near the vehicle nor was I around the vehicle.” Tr. 172. On July 14, 2009, Mr. Coryell received and signed a notice from AES that he was subject to “a 90 day trail review for all employees who are hired by [AES].” RX 1E. He also received and signed an AES “Company Employee Policy Memorandum,” which outlined “activities and conduct [which] will be considered reason for disciplinary action, up to and including dismissal.” RX 2C. This conduct included: (1) “exceeding the posted speed limit or driving at a speed that is considered dangerous under the weather conditions at the time of [an] incident”; (2) “reckless disregard for the equipment”; and (3) “disregard of the rules and regulations in effect at the job site.” RX 2C.

During his second period of employment with AES, Mr. Coryell’s driving skills were the subject of several complaints filed with the company. Mr. Gregorcyk testified that he had received complaints “from other drivers, truck pushers, from dispatch, and also from James Hargis, who was a designated trainer.” Tr. 304. He noted that these reports characterized Mr. Coryell as a “[v]ery unsafe and at risk, reckless type [of] driver.” Tr. 304. Similarly, Mr. Gerke reported that he received “numerous complaints on [Mr. Coryell’s] driving.” Tr. 250. Mr. Gerke had testified that whenever AES “sent [Mr. Coryell] out with a crew, like on a frack job to be ran tight, those guys expressed their concerns and said that ... we shouldn’t put him with them.” Tr. 252-253. For example, a complaint was submitted by William Chapman, a truck driver for AES, following a ride-along with Mr. Coryell on September 15, 2009. Tr. 351-355; RX 1A; RX 2D-11. Mr. Chapman reported that Mr. Coryell drifted across the center line on a

downgrade and ran a car off of the road. Tr. 353-354; RX 1A; RX 2D-11. He testified that Mr. Coryell had “no regard for [the driver’s] safety ... when he went around the curve.” Tr. 354. He opined that Mr. Coryell’s driving was “not very good” and indicated that he was frightened riding with him. Tr. 354.

On August 17, 2009, Mr. Coryell was accompanied on his shift by Mr. Hargis, who is a truck driver and driving trainer for AES. Tr. 377-378; RX 2D-12. Mr. Hargis testified that he “was given a list of all the night time employees and [Mr. Coryell] wasn’t the first and he wasn’t the last” person that he evaluated. Tr. 373. Mr. Coryell admitted that he understood the ride-along was intended to “evaluate my driving, my abilities to operate the equipment and to do the job.” Tr. 160. He also acknowledged that the evaluations were performed for all truck drivers who had worked for AES for less than 90 days. Tr. 160. Following his ride-along, Mr. Hargis completed an “A.E.S. Training Guide,” in which he assessed Mr. Coryell’s driving abilities. RX 2D-19 to 2-20. He made the following observations: (1) “brake [too] hard in curves”; (2) “on wet pavement stalled out on small hills”; (3) “starts [right] turns [too] soon” and “not driving for trailer”; (4) “wanted to slam on brakes and stop car following [too] close”; and (5) “cuts corners [and] not staying in lane.” RX 2D-19. His overall conclusion was that Mr. Coryell is a “hazard on the road.” RX 2D-19. Mr. Hargis subsequently prepared a narrative report regarding his observations of Mr. Coryell. RX 2D-12 to 2D-16. He reported as follows:

During the course of the night, I observed Mr. Coryell was driving across the yellow line several times including straight-aways. He shortened the curves by driving in the middle of the road. It appeared that he couldn’t see or wasn’t paying attention to his driving. One time he put the truck & trailer into a slide entering in a curve due to braking too hard. He was in a curve and his speed was only approx. 35 mph going into a 20 mph curve. It was as if he wasn’t expecting the curve. Several times he would brake too hard just before he got into a slide. He did this instead of adjusting his speed before going into the curve.

RX 2D-14. He also noted that Mr. Coryell “stalled the truck out” on two occasions because of “very poor” gear shifting. RX 2D-14 to 2D-15. He further observed that Mr. Coryell “did not drive for his trailer,” where he “started his turns way too early.” RX 2D-15. Based on these observations, Mr. Hargis concluded that Mr. Coryell is a “hazard on the road.” RX 2D-16.

Mr. Hargis provided a similar account of Mr. Coryell’s driving skills at both the hearing and in a sworn statement to OSHA. Tr. 377-381; RX 2D-17 to 2D-18. At the hearing, he provided the following overall assessment of Mr. Coryell:

I did not have a problem with him personally, but his driving, I had a problem with him driving for our company because he seemed to be a hazard on the road and it looked liked it was going to cause the company problems in the future ... looked like an accident waiting to happen.

Tr. 380-381. Mr. Coryell disputed these observations and emphasized that the reports fail to state that Mr. Hargis was smoking cigarettes during the ride-along. Tr. 166. He testified that he is allergic to cigarette smoke and opined that any poor driving was caused by his sensitivity to the smoke. Tr. 167-168. In addition, he alleged that Mr. Hargis ignored his requests to stop smoking. Tr. 167. In response, Mr. Hargis acknowledged that he had smoked during the ride-along, but testified that: (1) Mr. Coryell told him that he was not bothered by cigarette smoke; (2) Mr. Coryell never complained about the smoking; and (3) Mr. Coryell never indicated that he was “intoxicated” by the smoke. Tr. 374. Accordingly, Mr. Hargis reiterated his conclusion that Mr. Coryell is not a safe driver, but is instead “a hazard on the road.” Tr. 379. He testified that he reported his findings to Mr. Gregorcyk and recommended that AES “did not need [Mr. Coryell] as a driver.” Tr. 380.

As a result of Mr. Hargis’s evaluation, Mr. Coryell met with Mr. Gregorcyk on August 18, 2009. RX 2D-5. He was informed that he “would not be allowed to drive any AES vehicle” and was “sent home until further notice.” RX 2D-5. He was not, however, terminated from employment. Mr. Gregorcyk explained that it is AES’s policy “to be flexible and give people opportunities to see if they’ll improve.” Tr. 332. He nevertheless acknowledged, however, that Mr. Coryell is “an unsafe and at risk driver.” Tr. 306. At some point after the ride-along, Mr. Hargis was overheard making negative comments regarding Mr. Coryell to Jesse Gulguinn, who is a dispatcher with AES. Tr. 218-219, 395-396. Robert Smith, who is also a truck driver with AES, testified that he overheard Mr. Hargis questioning why Mr. Coryell was still employed by the company. Tr. 218-219. He admitted, however, that he could not hear *why* Mr. Hargis was speaking negatively of Mr. Coryell. Tr. 219. Mr. Hargis acknowledged that the conversation took place, but explained that he was merely expressing his disbelief that Mr. Coryell was still employed by AES after the ride-along on August 17, 2009. Tr. 395-396. He stated that he was surprised to see Mr. Coryell because “I recommended that he be terminated ... because he was an unsafe driver on the road and we didn’t need him killing anybody in one of our trucks.” Tr. 395.

In response to Mr. Coryell’s complaint, the DOT commenced an audit of AES on August 17, 2009. Tr. 279, 337. This was the same day as Mr. Hargis’s ride-along with Mr. Coryell. The DOT concluded its investigation on September 2, 2009. Tr. 279, 337. On September 18, 2009, Mr. Coryell received a letter from the DOT informing him that the “matter has been investigated and certain instances of noncompliance as you alleged were discovered.” CX 4-4. According to Mr. Gregorcyk, the DOT concluded that AES had committed between 40 and 45 violations of motor carrier safety regulations, including: (1) defective equipment on trucks; (2) failure to have fire extinguishers; (3) missing mud flaps on vehicles; and (4) “not having a medical consortium to conduct DOT sanctioned preemployment [sic] drug tests, randoms, [and] post accidents.” Tr. 330. Mr. Coryell submitted a number of print-outs from the DOT website that purportedly summarize the violations incurred by AES. *See* CX 3 to 3C. AES was assessed a total of \$36,400.00 in fines for the violations. Tr. 329. Mr. Gregorcyk testified that AES paid the fines and took steps to remedy the violations. Tr. 338-339. These measures included the implementation of a DOT-sanctioned drug test policy, as well as an overhaul of the company’s paperwork system and hiring procedures. Tr. 278.

As a result, Mr. Gregorcyk opined that AES's safety record has "improved tremendously" since the conclusion of the DOT audit. Tr. 338.

According to Mr. Gregorcyk and Mr. Gerke, however, AES was unaware that Mr. Coryell was the individual who had filed the complaint. Tr. 244, 255, 260, 281, 313. Mr. Gregorcyk testified that he had "no reports, no knowledge, or information that [Mr. Coryell] had spoken to the DOT." Tr. 281. Mr. Gerke similarly stated that he "did not have any clue that an employee called DOT." Tr. 244. In addition, Mr. Hargis testified that he was unaware that Mr. Coryell had filed a DOT complaint at the time of his ride-along and driving skills assessment in August 2009. Tr. 382-383. In fact, he stated that he did not know who Mr. Coryell was prior to August 17, 2009. Tr. 396. Mr. Coryell acknowledged that he had not informed anyone in AES's dispatch or management offices that he had filed the DOT complaint. Tr. 157-158. He also admitted that there was no evidence that the DOT had revealed his identity to AES. Tr. 157. He alleged, however, that he had told two or three of his co-workers that he had filed the complaint. Tr. 131-132. This is consistent with the testimony of Mr. Smith, who reported that a truck driver named Johnny Richardson informed him that Mr. Coryell had filed a DOT complaint against AES. Tr. 221. Mr. Smith admitted, however, that he and Mr. Richardson were the only individuals who knew that Mr. Coryell had filed the complaint. Tr. 221. Mr. Hargis also testified that, while he knows Mr. Richardson both personally and professionally, they never discussed the identity of the employee who filed the DOT complaint. Tr. 402.

During Mr. Coryell's second period of employment, AES adopted a strict policy regarding the use of filtering equipment when its drivers load water onto trucks. Mr. Gregorcyk described the policy as follows: "Any work that was assigned to our drivers involving pits, shallow ground water, flow back water, any of the types of water, it was mandatory ... that they had to tape, float, and screen their hoses." Tr. 284. A "screen" is a device that is attached to the end of a hose to filter solid materials out of the water. Tr. 109, 185, 256, 283. A "sock" is typically "just a white tube sock" that is placed over the screen to prevent smaller solid particles from being sucked into the hoses. Tr. 110, 188-189, 283. A "float" is designed for "buoyancy to keep [the] hose from sinking to the bottom because it is heavy." Tr. 283. Mr. Coryell noted that a float is important because it "keeps the hose at the top of the water where you're only sucking the true water or watery substance" and avoids the "wood chips ... metal chippings, shavings ... [that] tend to settle to the ground, to the bottom of the pit. Tr. 109-110. In addition, he stated that floats also prevent the hoses from tearing the plastic liners that are placed on the bottom and sides of the pits. Tr. 183-184. All of AES's drivers are required to carry screens, socks and floats on their trucks. Tr. 285. Each driver is required to use the filtration equipment when loading either pit water or shallow ground water. Tr. 216, 224-225, 236, 239, 258-259, 320, 343-344. Mr. Gregorcyk described the process for using the equipment as follows:

When [a driver] gets [to a pit], remove the hoses from the hose tray, and at that time that screen has got to be inserted and then tape and float the screen so that the hose can be lowered into the pit.

Tr. 286. AES does not require its drivers to use the filtration equipment when loading production water because “it’s not coming out of a pit where you have solid particles.” Tr. 288. The company adopted this policy in response to requirements imposed by Southwestern Energy. Tr. 210, 256, 347, 383-385. If an AES driver is caught not using the filtration equipment at a pit, the company runs the risk of losing its contract with Southwestern Energy. Tr. 185, 256-258, 385. According to Mr. Gerke, the company ran the risk of being placed in “time out” by Southwestern Energy, as well as losing its master service agreement, if its drivers were caught not using the socks, screens or floats at required locations. Tr. 256-258. Mr. Hargis similarly testified that AES stressed the importance of using this filtering equipment “because if [Southwestern Energy] walked up and didn’t see it, [than] we would be losing our job with [Southwestern Energy] and that was our main provider for our income ... at AES.” Tr. 385.

AES adopted the filtration equipment policy between April 2009 and August 2009. Tr. 186, 211, 236, 258, 261, 343, 384-385. Mr. Coryell alleges that he did not know this policy existed until after his termination from AES in September 2009. Tr. 193. The other testimony in the record, however, establishes that AES adopted the policy well before September 2009. For example, Daniel Thomas testified that AES imposed the filtration equipment requirement in the spring of 2009, and it was “common knowledge” from May 2009 to September 2009. Tr. 343-344. Similarly, Robert Smith and Joel George, who are both truck drivers with AES, testified that the company adopted the policy in either May 2009 or June 2009. Tr. 224-225, 236. AES takes a “zero tolerance” approach to drivers who fail to use the screens, socks or floats when loading water at a pit. Tr. 259, 303, 393. According to Mr. Gerke, after giving the drivers a chance to learn the policy, “there was a no tolerance because at that time period [Southwestern Energy] had warned us that we would lose work” if AES’s drivers did not use the screens, socks and floats. Tr. 259. Under this “zero tolerance” policy, if a driver fails to use the required equipment, they are terminated from employment with AES. Tr. 259, 303, 393.

AES utilizes a number of methods to communicate the policy requirements to its truck drivers. Initially, the company’s dispatchers and managers discussed the requirements at employee meetings and posted flyers on company bulletin boards. Tr. 224-225, 237, 258, 284, 326-327, 383. Mr. Gerke assessed the company’s approach to communicating the policy as follows:

[I]t was very important to our company that we did that. We preached that every day, every minute, every ticket. Every single person, I can promise you, that came through AES, if you asked them did you know about floats, screens and socks, they would tell you yes.

Tr. 256. Mr. Gregorcyk testified that the policy is “conveyed in monthly safety meetings” and is “posted on our company wide bulletin board.” Tr. 284. Mr. Thomas similarly stated that the company “had a company meeting ... to let everybody know, and we also posted it by the time clocks out in the shop, and in the break room.” Tr. 344. For example, a notice dated September 21, 2009, informed employees that “it is mandatory that all hoses be filtered & screened on [Southwestern Energy] pits.” CX 9-1.

Mr. Coryell testified, however, that he never knew about AES's policy regarding screens, socks, and floats. Tr. 428. He emphasized that AES did not have an employee policy manual that outlined the filtration requirements. Tr. 428. He also alleged that AES did not hold regular employee meetings during his employment. Tr. 180. Mr. Coryell acknowledged, however, that he had been informed by AES that filtration equipment was required in certain situations. Tr. 186, 194. Mr. Smith similarly testified that all of AES's drivers had been verbally informed "at some point in time" that screens, socks and floats are required for all pits. Tr. 224. In addition, Mr. Hargis stated that AES "drilled it into us" at meetings and on bulletin boards that the use of filtration equipment was required. Tr. 383. Furthermore, Mr. Thomas testified that he had spoken to all of AES's drivers regarding the policy between June 2009 and September 2009. Tr. 345. He stated that "[i]t had to be done ... [i]t was a [Southwestern Energy] mandate." Tr. 347.

Another method in which AES stresses the importance of the filtration equipment is through written instructions on the bottom of work orders. Tr. 239, 261, 284, 344, 384. Mr. Gregorcyk, Mr. Gerke and Mr. Hargis all testified that written notice is provided to AES truck drivers at the bottom of every work order involving pit water, shallow ground water, or flow back water. Tr. 258, 261, 384. In addition, Mr. Gregorcyk and Mr. Thomas both reported that verbal notice is given by dispatchers when they issue the work orders to the truck drivers. Tr. 284, 344. Joel George, who is currently a truck driver with AES, testified that instructions regarding the use of filtration equipment are present on every work order that he receives for pit work. Tr. 239. Mr. Coryell similarly acknowledged that his work orders informed him as to when filtration equipment was required. Tr. 186. Both parties submitted copies of work orders involving pit water, shallow ground water and flow back water from July 2009 to September 2009. CX 5-6, 5-8 to 5-19; RX 3-2 to 3-7, 3-10. While a number of the orders do not contain any language regarding the use of filtration equipment, work orders from August 2009 and September 2009 explicitly state that screens, socks and floats were required. CX 5-17; RX 3-2 to 3-7, 3-10. In light of these written instructions, as well as the bulletins and employee meetings, Mr. Hargis opined that "I don't know how you could miss [the instructions] when you're trained." Tr. 386. He concluded that if Mr. Coryell "had been there three days, he would have known he was supposed to float his screens ... and put [socks] on the tape and hoses." Tr. 403.

On September 16, 2009, Mr. Coryell received an "A.E.S. Pit Work Order" from Mr. Thomas. Tr. 107; CX 5-19; RX 3-10. The work order instructed him to "haul [shallow ground water] from small pit on the Stobaugh" drilling lease to the AES yard. CX 5-19; RX 3-10. The work order indicates that the assignment was for Southwestern Energy. CX 5-19; RX 3-10. The parties each submitted a copy of the work order. CX 5-19; RX 3-10. The copy submitted by AES contains additional written instructions for the use of "sock, screen, float, tape hoses." RX 3-10. The copy submitted by Mr. Coryell does not contain this language. CX 5-19. Mr. Coryell acknowledged that these written instructions meant that he was supposed to use the filtration equipment on the particular assignment, but maintained that the instructions were not on his copy of the work order. Tr. 190. Instead, he alleged that someone in the AES dispatch office added the instructions *after* he had already left the office. Tr. 197. Mr. Thomas testified,

however, that he was the dispatcher who prepared the work order on September 16, 2009. Tr. 346. He stated that the original order contained the language for “sock, screen, float, tape hoses,” and that he had given a copy of this order to Mr. Coryell. Tr. 346-347. He explained that the filtering equipment needed to be used because it “was a [Southwestern Energy] mandate.” Tr. 347. Mr. Gregorcyk testified that he had also reviewed the original work order and confirmed that it contained instructions to use the filtering equipment. Tr. 298. He stated that he had no reason to believe that the original order had been altered. Tr. 299.

After receiving a copy of the work order, Mr. Coryell drove to the Stobaugh drilling lease and began “pulling” water from the pit. Tr. 108. Regardless of any disparity in the language of the work order, Mr. Coryell admitted that he did not use any screens, socks or floats when he started the assignment. Tr. 109, 190. While Mr. Coryell was “pulling” the water, Charles Campbell arrived at the Stobaugh lease with his own work order to pull water from the pit. Tr. 414. Mr. Campbell testified that he is currently a truck driver for AES. Tr. 411. He also prepared a written account of his encounter with Mr. Coryell. See RX 4. After attaching a screen, sock and float to his own hose, Mr. Campbell asked Mr. Coryell if he was also using the filtering equipment. Tr. 108, 190, 415. When Mr. Coryell replied that he was not, Mr. Campbell informed him that he was required to use screens, socks and floats at the pit. Tr. 108, 415; RX 4. Mr. Coryell and Mr. Campbell provided different accounts of what transpired next. According to Mr. Campbell, despite having the required equipment on his truck, Mr. Coryell continued to load water without a screen, sock, or float. Tr. 416, 418-419; RX 4. He testified that he had even offered to help Mr. Coryell attach the equipment to his hose, but this offer was refused. Tr. 420. He reported that Mr. Coryell told him “that’s how he usually did the job.” RX 4. Mr. Campbell testified that Mr. Coryell’s hose then got “stopped up” with trash and debris. Tr. 415. He stated that they left the pit at the same time. Tr. 419. On the other hand, Mr. Coryell testified that he stopped loading water, emptied his tank, and attached the filtering equipment to his hose. Tr. 108. He stated that Mr. Campbell actually “aided me [in] pulling the hoses out of the water, tying down the floats on the ends of them and putting screens on.” Tr. 421. He denied telling Mr. Campbell that loading water without the filtering equipment was how he usually did the job. Tr. 191-192. Mr. Coryell testified that he then “pulled” two loads of filtered water and hauled them back to the AES yard. Tr. 108.

When Mr. Coryell returned to the AES yard with his second load of water, he was told to “go ahead and go home, [he] was done.” Tr. 108. Mr. Campbell notified Daniel Thomas that Mr. Coryell had not used any screens, socks or floats during his assignment at the Stobaugh lease. Tr. 347-348. Mr. Thomas then relayed this information to Mr. Gregorcyk. Tr. 300, 348. Mr. Gregorcyk met with Mr. Campbell, who told him that Mr. Coryell did not use any filtering equipment at the pit, despite having screens, socks and floats on his truck. Tr. 301. Mr. Coryell was then called into the office and informed that he was being immediately terminated from employment with AES. Tr. 126, 259, 302. On September 17, 2009, Mr. Gregorcyk completed a “Personnel Action Form,” where he indicated that Mr. Coryell had been terminated for the following reasons: (1) “extracted cuttings without screen” and (2) “spilled cuttings.” RX 2D-3. While Mr. Coryell refused to sign the personnel form, his termination took effect on September 17,

2009. Tr. 303; CX 6-1; RX 2D-3, 2D-7. Mr. Coryell testified that he was fired after being “accused of extracting cuttings from the pit ... [and] also accused of spilling cuttings.” Tr. 108. Both Mr. Gregorcyk and Mr. Gerke testified that the main reason for Mr. Coryell’s termination was his failure to use a screen, sock or floats. Tr. 259, 302. Mr. Gregorcyk acknowledged that he was also aware of Mr. Coryell’s two prior written warnings for unsafe conduct, as well as the reports from Mr. Hargis and Mr. Chapman regarding his unsafe driving. Tr. 312. He thus testified as follows regarding his decision to fire Mr. Coryell:

A combination of reasons that supported my decision to take that final action, and I think the crowning blow would have been the negligence of not utilizing the screen, but I also tied in the reports, the training guide from Mr. Hargis, the report from Will Chapman, drivers and truck pushers, very unsafe and at risk, just not an employee that we could continue to have as a driver.

Tr. 313. Mr. Gerke similarly noted that Mr. Coryell’s poor driving ability did not help his situation, and characterized the incident on September 16, 2009, as “the straw that broke the camel’s back.” Tr. 259. Both Mr. Gregorcyk and Mr. Gerke, however, were adamant that they did not know that Mr. Coryell had filed the DOT complaint when they terminated his employment on September 17, 2009. Tr. 260, 313.

On September 21, 2009, Mr. Coryell filed a complaint with OSHA, where he alleged that AES had terminated his employment because he was suspected of filing a complaint with the DOT. Mr. Coryell provided several reasons for his belief that AES had retaliated against him. Tr. 131-136. First, he noted that he had informed two or three of his fellow drivers that he had filed the DOT complaint. Tr. 131-132. He testified that after “some time had passed,” he began to feel like he was “getting singled out” and being “picked on in certain ways.” Tr. 131-132. Second, he found it significant that AES did not have an employee policy manual during his employment. Tr. 135. He cited this as proof that his termination was not really because of his failure to use screens, socks or floats on September 16, 2009. Tr. 135. Third, he noted that he was terminated by AES within seven to 10 days after the DOT had completed its onsite investigations at the AES facilities. Tr. 142. Mr. Coryell admitted, however, that he has no evidence that any members of AES’s management knew that he had filed the DOT complaint. Tr. 157-158.

Mr. Coryell was unemployed for approximately three to four months after his termination from AES. Tr. 136. In October 2009, he applied for a truck driving job with Quick-It Logistics in Arkansas. Tr. 136. His application was delayed for several months before he was hired in January 2010. Tr. 87, 136. From October 2009 to January 2010, Mr. Coryell sought other truck driving opportunities. Tr. 136. He testified that he did not receive his first unemployment check from AES until December 2009. Tr. 136. After being hired by Quick-It, Mr. Coryell testified that he worked for the company until June 2010 and his job duties were similar to those at AES. Tr. 87. He received wages of \$16.00 per hour at Quick-It and described his work hours as “comparable” to what he worked at AES. Tr. 138. Mr. Coryell testified that he was fired from Quick-It in June 2010 “within three to five days after receiving ... documents pertaining to the [present]

court proceedings that Quick-It also received copies of.” Tr. 87. He was unemployed and receiving \$410.00 per week in unemployment compensation from Quick-It. Tr. 87, 139. Since June 2010, he had sought both truck driving work and seasonal jobs, but had been unable to get past the application stage for any job opportunity. Tr. 138-139. He opined that “my driving career in Faulkner County [Arkansas] at this point is over because of my employment with [AES] and these proceedings ... I’m pretty sure I couldn’t get a driving job.” Tr. 141.

In the present action, Mr. Coryell is seeking back-pay from AES for his termination. Tr. 140-141. He testified, however, that he does not wish to be reinstated should his claim prove successful. Based upon the negative references that AES has provided to other potential employers, Mr. Coryell considers his relationship with the company to be “irretrievably broken.” Tr. 141.

II. Discussion

In order to prevail on his claim under the STAA, Mr. Coryell must initially make a *prima facie* showing that his protected activity was a contributing factor in his termination by AES.¹¹ If Mr. Coryell satisfies his *prima facie* case by a “preponderance of the evidence,” the burden shifts to AES to demonstrate by “clear and convincing evidence” that it would have terminated Mr. Coryell even absent the protected activity.¹² For the reasons discussed below, I find that Mr. Coryell has failed to establish that his filing of a DOT complaint was a contributing factor to his termination by AES. I also find, however, that even if Mr. Coryell had satisfied his *prima facie* case, AES has presented “clear and convincing evidence” that it would have fired him even absent his filing of a DOT complaint.

A. Mr. Coryell Has Failed to Satisfy His *Prima Facie* Case by a “Preponderance of the Evidence”

To satisfy his *prima facie* burden under the STAA, Mr. Coryell must prove three elements by a “preponderance of the evidence.” First, he must show that his filing of a complaint with the DOT constitutes protected activity.¹³ Second, he must establish that AES took an adverse employment action against him.¹⁴ Finally, he must show that his filing of a DOT complaint was a “contributing factor” in AES’s adverse employment action.¹⁵

¹¹ 49 U.S.C. § 42121(b)(2)(B)(i). *See also* 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) (“It is the Secretary’s position that the complainant [in an STAA case] must prove by a ‘preponderance of the evidence’ that his or her protected activity ... contributed to the adverse action at issue.”); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 9 (ARB Sept. 15, 2011) (STA).

¹² 49 U.S.C. § 42121(b)(2)(B)(ii). *See also* 75 Fed. Reg. at 53,550; *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9.

¹³ *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9; *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, slip op. at 4 (ARB June 29, 2011) (STA); *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA).

¹⁴ *Id.*

¹⁵ *Id.*

1. *Protected Activity*

As an initial matter, I find that Mr. Coryell has proven that he engaged in protected activity when he filed his complaint with the DOT. In relevant part, the STAA prohibits an employer from retaliating against an employee who “has *filed a complaint* or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation.”¹⁶ The statute similarly prohibits retaliation by an employer that “perceives that the employee has filed ... a complaint.”¹⁷ Thus, the STAA recognizes that filing a complaint regarding commercial motor vehicle safety violations is protected activity. In addition, the Administrative Review Board has expressly found that filing a complaint with the DOT constitutes protected activity under the STAA.¹⁸

In this case, Mr. Coryell filed a complaint against AES with the DOT on March 19, 2009. Tr. 100, 102, 119-120; CX 4. He alleged that AES had failed to administer pre-employment drug tests to prospective employees, as well as failing to administer drug tests to truck drivers involved in on-the-job accidents. CX 4-1. Mr. Coryell also reported that AES had required him to work more than 12 hours per day on numerous occasions. CX 4-1. On April 2, 2009, the DOT provided written notice to Mr. Coryell acknowledging his complaint regarding AES’s “regulatory noncompliance” and informing him that an investigation was pending. CX 4-3. Thus, Mr. Coryell’s complaint against AES alleged a “violation of a commercial motor vehicle safety or security regulation.”¹⁹ Accordingly, I find that he engaged in protected activity under the STAA.

2. *Adverse Employment Action*

I also find that Mr. Coryell was the subject of an adverse employment action by AES. The STAA expressly provides that a “person may not *discharge* an employee” for engaging in protected conduct.²⁰ The evidence clearly shows, and AES does not dispute, that Mr. Coryell was terminated from his employment with the company on September 17, 2009. Tr. 126, 259, 302; CX 6-1; RX 2D-3, 2D-7. Mr. Coryell has not alleged that he suffered any other adverse actions. Therefore, I find that Mr. Coryell suffered an “adverse employment action” when AES terminated his employment.

3. *Protected Activity as a “Contributing Factor” to the Adverse Employment Action*

The final element that Mr. Coryell must establish to satisfy his *prima facie* case is that his filing of a complaint with the DOT was a “contributing factor” in AES’s decision to terminate his employment. A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse

¹⁶ 49 U.S.C. § 31105(a)(1)(A)(i) (emphasis added).

¹⁷ 49 U.S.C. § 31105(a)(1)(A)(ii).

¹⁸ See *Hollenbeck v. Universal Fuel, Inc.*, ARB No. 07-054, slip op. at 3 (ARB Aug. 26, 2008) (STA).

¹⁹ 49 U.S.C. § 31105(a)(1)(A)(i).

²⁰ 49 U.S.C. § 31105(a)(1) (emphasis added).

employment] decision.”²¹ A complainant may satisfy this element by providing either direct or indirect proof of contribution.²² Direct evidence is “smoking gun” evidence that “conclusively links the protected activity and the adverse action and does not rely upon inference.”²³ If the complainant does not produce direct evidence of contribution, “he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment.”²⁴ In proving that protected activity was a contributing factor in the adverse employment action, “a complainant need not necessarily prove that the [employer’s] articulated reason was a pretext in order to prevail, because a complainant can alternatively prevail by showing that the [employer’s] reason, while true, is only one of the reasons for its conduct, and that another reason was a prohibited one.”²⁵ In order to establish contribution, however, a complainant must necessarily show that his employer was aware of his protected conduct.²⁶

In the present case, Mr. Coryell alleges that he was terminated by AES because the company suspected that he had filed a complaint with the DOT. As an initial matter, he found it significant that he was fired within seven to 10 days after the DOT had completed its onsite investigations. Tr. 142. Mr. Coryell also testified that he began to feel like he was “getting singled out” and was being “picked on in certain ways” by AES. Tr. 131-132. He attributed the cause to the fact that he had informed two or three of his fellow drivers that he had filed the DOT complaint. Tr. 131-132. This is consistent with the testimony of Robert Smith, who reported that a truck driver named Johnny Richardson had told him that Mr. Coryell had filed a DOT complaint against AES. Tr. 221. Mr. Richardson was a personal and professional acquaintance of James Hargis, who gave the negative assessment of Mr. Coryell’s driving skills. Tr. 402. Mr. Coryell thus argues that it “is likely that Mr. Richardson spoke at length with Mr. [Hargis] about Mr. Coryell telling him that he had notified DOT about [AES].” Complainant’s Brief at 2. In addition, he contends that “one can conclude that if Mr. Richardson informed Mr. Smith then it would be more [than] likely that Mr. Richardson would speak with a friend and co-worker [Mr. Hargis] in depth.” Complainant’s Brief at 2. Accordingly, he argues that it “is more than likely” that AES’s management learned of his DOT complaint through “word of mouth.” Complainant’s Brief at 3.

At the hearing, however, Mr. Coryell admitted that he has no evidence that any members of AES’s management knew that he had filed the complaint when they terminated his employment. Tr. 157-158. Neither party has submitted any documentary evidence that AES was aware that Mr. Coryell had filed the complaint. Instead, the testimonial evidence in the record establishes that AES’s management *did*

²¹ *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA) (quoting *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, slip op. at 4 (ARB Jan. 30, 2008) (AIR)).

²² *Id.*

²³ *Id.* (citing *Sievers*, ARB No. 05-109, slip op. at 4–5).

²⁴ *Id.*

²⁵ 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) (internal quotation marks omitted).

²⁶ *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, slip op. at 4 (ARB June 29, 2011); *Williams*, ARB No. 09-092, slip op. at 6. See also *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 n.1 (6th Cir. 1987) (per curiam) (recognizing that the employer in an STAA case must know of a complainant’s protected conduct).

not know that he had filed the DOT complaint. Mr. Coryell himself admitted that he had not personally informed anyone in AES's management or dispatch offices that he had filed the DOT complaint. Tr. 157-158. He also acknowledged that there is no evidence that the DOT had revealed his identity during its investigation. Tr. 157. A number of other witnesses have indicated that they were also unaware that Mr. Coryell had filed the DOT complaint. Mr. Hargis testified that he was unaware that Mr. Coryell had filed a DOT complaint when he performed his ride-along in August 2009 and provided a negative evaluation of Mr. Coryell's driving skills. Tr. 382-383. In fact, he admitted that he did not know anything about Mr. Coryell prior to the ride-along. Tr. 396. While acknowledging that he is friends with Mr. Richardson, Mr. Hargis testified that they never discussed the identity of the AES employee who had filed the DOT complaint. Tr. 402. This is consistent with the testimony of Mr. Smith, who admitted that he and Mr. Richardson were the only individuals who knew that Mr. Coryell had filed the complaint. Tr. 221. I have no reason to doubt the credibility of Mr. Hargis or Mr. Smith, and therefore find that their testimony supports the conclusion that AES *did not know* that Mr. Coryell had filed the DOT complaint at the time of his termination.

More importantly, however, the two individuals who made the decision to terminate Mr. Coryell's employment have repeatedly testified that they were unaware that he had filed the DOT complaint. Tr. 244, 255, 260, 281, 313. Allan Gregorcyk, who is currently the general manager of AES, testified that he had "no reports, no knowledge, or information that [Mr. Coryell] had spoken to the DOT." Tr. 281. Instead, Mr. Gregorcyk stated that the "crowning blow" in his decision to fire Mr. Coryell was "the negligence of not utilizing the screen" on September 16, 2009. Tr. 313. He also considered "the reports, the training guide from Mr. Hargis, the report from Will Chapman, drivers and truck pushers," and characterized Mr. Coryell as "very unsafe and at risk, just not an employee that we could continue to have as a driver." Tr. 313. Similarly, John Gerke, who was a sales manager with AES in September 2009, repeatedly stated that he did not know who had filed the DOT complaint. Tr. 244, 255. When asked whether he had heard "anybody say that [Mr. Coryell] had made a complaint to the DOT," Mr. Gerke responded "absolutely not." Tr. 255. To the contrary, he stated that he did not "have any clue that an employee called DOT." Tr. 244. Mr. Gerke instead testified that Mr. Coryell was fired for failing to use a screen, sock or floats at the Stobaugh pit on September 16, 2009. Tr. 259. He also noted that Mr. Coryell's poor driving skills did not help his situation. Tr. 259. I find no reason to doubt the credibility of either Mr. Gregorcyk or Mr. Gerke. In fact, their testimony is consistent with the documentary evidence in the record. For example, the "Personnel Action Form" completed on September 17, 2009, states that Mr. Coryell was terminated by AES for extracting cuttings without a screen and spilling cuttings. RX 2D-3. In addition, Mr. Gregorcyk and Mr. Gerke's statements are consistent with the testimony of not only Mr. Hargis and Mr. Smith, but of Mr. Coryell himself. Accordingly, I find that the testimonial evidence establishes that neither Mr. Gregorcyk nor Mr. Gerke were aware that Mr. Coryell had filed the DOT complaint when they terminated his employment in September 2009.

As stated above, an essential component of establishing contribution under the STAA is showing that the employer was aware of a complainant's protected activity

when it took the adverse employment action against that employee.²⁷ Despite the lack of any supporting evidence, Mr. Coryell maintains that it is “more than likely” that AES learned through “word of mouth” that he had filed the DOT complaint. Complainant’s Brief at 3. The Administrative Review Board, however, has rejected a similar argument in a recent decision under the STAA. In *Litt v. Republic Services of Southern Nevada*,²⁸ the Board addressed the issue of contribution where the complainant “offered no evidence that any of [the employer’s] decision-makers involved in his termination knew of or were informed that [he] ... filed [an] OSHA complaint.”²⁹ Much like Mr. Coryell, the complainant in *Litt* argued that it was “reasonable to infer” that his employer’s decision-makers were aware that he had filed the OSHA complaint, since they were aware that a complaint had been filed and the complainant had informed other co-workers that he had filed the complaint.³⁰ In rejecting this argument, the Board held as follows:

Litt’s mere assertions that it can be inferred that [the decision-makers] did know he filed the complaint are not sufficient circumstantial evidence to establish that Republic was aware of Litt’s OSHA complaint or alleged protected activity by a preponderance of the evidence, and we note that there is no presumption available under the STAA or its implementing regulations to establish this necessary element of his claim.³¹

The Board found it significant that “all of the decision-makers denied that they knew that [the complainant] filed the OSHA complaint.”³² The Board also emphasized that there was “no evidence that any of [the complainant’s co-workers] informed any of the decision-makers involved in [the complainant’s] termination that [he] had filed the complaint.”³³ Accordingly, the Board concluded that the complainant had failed to carry his burden of establishing that his employer was aware of his protected activity at the time it terminated his employment.³⁴

In the present case, Mr. Coryell has similarly failed to present any evidence that any “decision-maker” at AES was aware that he had filed the DOT complaint. As stated above, both Mr. Gregorcyk and Mr. Gerke have repeatedly denied that they knew of Mr. Coryell’s protected conduct when they terminated his employment on September 17, 2009. Tr. 244, 255, 260, 281, 313. While the evidence establishes that Mr. Smith and Mr. Richardson were aware of Mr. Coryell’s actions, Tr. 131-132, 221, there is no evidence that either co-worker informed any of AES’s “decision-makers” that Mr. Coryell had filed the DOT complaint. In fact, Mr. Smith testified that he and Mr. Richardson were the *only individuals* who knew that Mr. Coryell had submitted the complaint. Tr. 221. Accordingly, I find Mr. Coryell’s argument, that it is “more than likely” that AES’s management knew of his protected activity, to be insufficient to

²⁷ See *id.*

²⁸ ARB No. 08-130 (ARB Aug. 31, 2010) (STA).

²⁹ *Id.*, slip op. at 8.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*, slip op. at 7.

³³ *Id.*

³⁴ *Id.*, slip op. at 9.

establish that the company was aware that he had filed the DOT complaint. I therefore find that Mr. Coryell has failed to show by a preponderance of the evidence that AES was aware of his protected conduct when it terminated his employment on September 17, 2009.

For the reasons discussed above, I find that the evidence in the record does not establish that AES knew that Mr. Coryell had filed the DOT complaint. In addition, Mr. Coryell's argument that it is "more than likely" that AES knew of his complaint is contrary to both the evidence and the law governing this case. I therefore find that Mr. Coryell has failed to satisfy his burden of showing that AES was aware of his protected conduct when it terminated his employment. As a result, Mr. Coryell has necessarily failed to show that his filing of a DOT complaint was a "contributing factor" in AES's decision to terminate his employment. For these reasons, I conclude that Mr. Coryell has not established his *prima facie* case under the STAA, and his claim must therefore fail.

B. AES Has Presented "Clear and Convincing Evidence" That It Would Have Fired Mr. Coryell Regardless of the DOT Complaint

Even were I to find that Mr. Coryell has made a *prima facie* showing under the STAA, AES has presented "clear and convincing evidence" that it would have fired Mr. Coryell even absent his filing of the DOT complaint. As stated above, an employer may avoid liability for retaliation if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse employment action regardless of the protected conduct.³⁵ "Clear and convincing evidence" is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."³⁶ This is a higher burden of proof than the "preponderance of the evidence" standard.³⁷

In the present case, AES has presented extensive evidence that it terminated Mr. Coryell's employment due to his failure to use socks, screens and floats at the Stobaugh pit on September 16, 2009. Charles Campbell, who is a truck driver for AES, testified that he reported Mr. Coryell to AES's dispatch office for not using this filtration equipment, despite being required to do so. Tr. 416. This is confirmed by Daniel Thomas, who testified that he was the dispatcher who initially received Mr. Campbell's complaint regarding Mr. Coryell. Tr. 347-347. Mr. Thomas stated that he then forwarded the complaint to Allan Gregorcyk. Tr. 348. Both Mr. Gregorcyk and John Gerke, who were the two "decision-makers" involved in Mr. Coryell's termination, testified that he was fired for failing to use the socks, screens or floats on September 16, 2009. Tr. 259, 302. Mr. Gregorcyk stated that "the crowning blow would have been the negligence of not utilizing the screen." Tr. 313. Similarly, Mr. Gerke testified that Mr. Coryell was fired for failing to use a screen, sock or floats at the Stobaugh pit. Tr. 259.

³⁵ 49 U.S.C. § 42121(b)(2)(B)(iv); 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010). See also *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 9 (ARB Sept. 15, 2011) (STA); *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA).

³⁶ *Williams*, ARB No. 09-092, slip op. at 6 (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006) (AIR)).

³⁷ 75 Fed. Reg. at 53,550.

This is consistent with the “Personnel Action Form” completed on September 17, 2009, which states that Mr. Coryell had been terminated for two reasons: (1) “extracted cuttings without screen” and (2) “spilled cuttings.” RX 2D-3. In addition, Mr. Coryell acknowledged at the hearing that he was terminated after being “accused of extracting cuttings from the pit ... [and] also accused of spilling cuttings.” Tr. 108. Furthermore, he expressly admitted that he was not using the socks, screens or floats when Mr. Campbell confronted him on September 16, 2009. Tr. 108, 190.

The evidence presented by AES also documents the importance that the company placed in using screens, socks and floats. According to Mr. Gerke, AES adopted a “no tolerance” policy for using the equipment “because at that time period [Southwestern Energy] had warned us that we would lose work” if the company’s drivers did not use screens, socks or floats. Tr. 259. He stated that AES would be put in “time out” by representatives for Southwestern Energy if the equipment was not used, where the company would not be given assignments for periods of time. Tr. 256-258. In addition, he testified that if AES’s drivers were caught not using the equipment on more than one occasion, the company ran the risk of Southwestern Energy revoking its master service agreement. Tr. 258. Mr. Gerke thus stated that:

[I]t was very important to our company that we did that. We preached that every day, every minute, every ticket. Every single person, I can promise you, that came through AES, if you asked them did you know about floats, screens and socks, they would tell you yes.

Tr. 256. Mr. Gregorcyk similarly described AES’s policy as “zero tolerance,” where failure to use this filtering equipment would “result in termination.” Tr. 303. As stated above, I find no reason to doubt the credibility of either Mr. Gregorcyk or Mr. Gerke. In addition, several other AES employees have testified regarding the importance of complying with the company’s policy. According to James Hargis, the company stressed the importance of using this equipment “because if [Southwestern Energy] walked up and didn’t see it, [then] we would be losing our job with [Southwestern Energy] and that was our main provider for our income ... at AES.” Tr. 385. He stated that AES “drilled it into us” at meetings and on company bulletin boards that the filtration requirement was required. Tr. 383. Two of Mr. Coryell’s former co-workers, Mr. Campbell and Joel George, both testified that the use of screens, socks and floats was required for all “pit work.” Tr. 236-237, 414. Another former truck driver, Tim Willenberg, similarly stated that the use of filtering equipment was “a requirement that [came] down from [Southwestern Energy].” Tr. 210. In addition, Mr. Thomas confirmed that AES adopted a policy requiring the use of screens, socks and floats in the spring of 2009. Tr. 343-344. He stated that “[i]t had to be done ... [i]t was a [Southwestern Energy] mandate.” Tr. 347.

As stated above, “clear and convincing evidence” must be evidence “indicating that the thing to be proved is highly probable or reasonably certain.”³⁸ I find that the statements of Mr. Gregorcyk and Mr. Gerke, which are consistent with the testimony of

³⁸ *Williams*, ARB No. 09-092, slip op. at 6 (quoting *Brune*, ARB No. 04-037, slip op. at 14).

Mr. Coryell's former co-workers, establishes that AES had a "zero tolerance" policy regarding the use of socks, screens and floats at the time of Mr. Coryell's termination in September 2009. In addition, the evidence establishes that AES adopted this policy in order to preserve its business relationship with Southwestern Energy. Furthermore, the evidence clearly shows that Mr. Coryell failed to use the filtering equipment at the Stobaugh pit on September 16, 2009. In fact, Mr. Coryell admits that he did not use this equipment. I thus find that the evidence establishes that, at a minimum, it is "highly probable or reasonably certain" that AES terminated Mr. Coryell's employment for failing to use the socks, screens or floats on September 16, 2009. Accordingly, I find that AES has presented "clear and convincing evidence" that it would have fired Mr. Coryell even absent his filing of a DOT complaint. I therefore conclude that, even if Mr. Coryell had established his *prima facie* case, his claim under the STAA must still fail.

III. Conclusion

For the reasons discussed above, I find that Mr. Coryell has failed to establish his *prima facie* case under the STAA. While the evidence establishes that he engaged in protected activity when he filed his DOT complaint, and was subject to an adverse employment action by AES, Mr. Coryell has failed to show that AES was aware of his protected activity when it terminated his employment. Accordingly, he necessarily cannot establish that his filing of a DOT complaint was a "contributing factor" in AES's decision to terminate his employment on September 17, 2009. Furthermore, the evidence establishes that AES fired Mr. Coryell for his failure to use socks, screens or floats during a work assignment on September 16, 2009. I therefore find that AES has produced "clear and convincing evidence" that it would have terminated Mr. Coryell's employment even absent his filing of the DOT complaint. For all of these reasons, Mr. Coryell's claim of retaliation under the STAA must fail.

ORDER

The complaint for whistleblower protection under the Surface Transportation Assistance Act, filed by Sidney Coryell with the Occupational Safety and Health Administration on September 21, 2009, is DISMISSED.

A

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may

be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it.³⁹ Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically.⁴⁰

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health.⁴¹

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor. pursuant to ⁴²Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed

³⁹ See 29 C.F.R. § 1978.110(a).

⁴⁰ See 29 C.F.R. § 1978.110(a).

⁴¹ See 29 C.F.R. § 1978.110(a).

⁴² See 29 C.F.R. §§ 1978.109(e), 1978.110(a) (2011).

notifying the parties that it has accepted the case for review.⁴³

⁴³ See 29 C.F.R. §§ 1978.110(a) and (b).