U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 February 2017

Case No.: 2016-STA-36

In the Matter of:

SHAWN BATES,
Complainant,

v.

COSHOCTON TRUCKING, INC.,
Respondent.

Appearances:

Steven B. Potter, Esq
Jared S. Klebanow, Esq.
Cleveland, Ohio
For Complainant

Timothy Cowans, Esq.
William Creedon, Esq.
Columbus, Ohio
For Respondent

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the whistleblower protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. §31105. Shawn Bates ("Complainant") was a truck driver employed by Coshocton Trucking, Inc. ("Respondent"). Complainant alleges that Respondent unlawfully terminated his employment: "[A]ll that Shawn Bates wanted was to be safe and to obey the law. As a result, he was fired."[1] Complainant seeks back pay, front pay, emotional distress damages, punitive damages, attorney fees and litigation costs.

Procedural History

Complainant was employed by Respondent as a truck driver. Complainant's last day of work with Respondent was June 2, 2015. On June 8, 2015, Complainant filed a Complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor. In

[1] Transcript of formal hearing ("Tr.") 24-25.

his OSHA Complaint, Complainant alleged that he had been terminated from employment by Respondent in violation of the whistleblower protection provisions of STAA.

Following an investigation, OSHA dismissed the Complaint on March 10, 2016. Complainant requested a hearing before the Office of Administrative Law Judges of the Department of Labor on April 1, 2016. The case was assigned to me on July 5, 2016. Following a conference call with counsel, I issued an Order on July 6, 2016 setting the formal hearing for November 16, 2016.

Complainant filed a Motion for Summary Decision on October 14, 2016. Employer filed a Motion for Summary Decision on October 17, 2016. On November 1, 2016, I issued an Order denying both of the Motions for Summary Decision.

I conducted the formal hearing in Courtroom 442 of the John Seiberling United States Courthouse in Akron, Ohio on November 16, 2016. Complainant testified at the hearing. Other witnesses also presented testimony. I admitted into the record Joint Exhibit[2] A, Complainant's Exhibits[3] 1 through 7 and Respondent's Exhibits[4] B, C, D, E, F, G, H, I, K, L, M, N, P and Q.[5]

Post-Hearing briefs have been submitted by both parties.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

Stipulated Facts

At the hearing, the parties stipulated to the following facts, and I so find:

1. Bates was hired by Respondent on October 2, 2013.

2. While employed by Respondent, Bates operated a "commercial motor vehicle" as defined in 49 U.S.C. §31101(1).

3. Respondent is an "employer" as defined in 49 USC §31101(3).

4. Respondent is also a "person" as defined in 49 CFR §1978.101(k).

5. At all relevant times, Respondent was subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105.

6. At all relevant times, Bates met all of the requirement to be considered as a "100 air-mile radius driver" as defined in 49 CFR § 395.1(e)(1).

[2] "JX".
[3] "CX".
[4] "EX".
[5] I admitted Respondent's Exhibit M (Complainant's driver logs from November 1, 2014 through May 25, 2015) over the Complainant's objection. I sustained Complainant's objections to the admission of Respondent's Exhibits O (Ohio Department of Job and Family Service records) and R (handwritten notes and "research materials"), and these proffered exhibits were not admitted.

7. While employed by Respondent as a 100 air-mile radius driver, Complainant drove these hours on the following days:

Tuesday, May 26, 2015	10.5 hours
Wednesday, May 27, 2015	9.5 hours
Thursday, May 28, 2015	11.5 hours
Friday, May 29, 2015	9.5 hours
Saturday, May 30, 2015	8.5 hours
Sunday, May 31, 2015	5.5 hours
Monday, June 1, 2015	9.5 hours
Tuesday, June 2, 2015	4.5 hours

8. Complainant has not worked for Respondent at any time after June 2, 2015.

9. Complainant filed an Hours of Service complaint against Respondent with Occupational Safety and Health Administration of the United States Department of Labor on June 8, 2015.

10. Complainant's OSHA complaint was timely.

11. OSHA dismissed Complainant's complaint on March 10, 2016.

12. Complainant submitted a request for hearing to the Office of Administrative Law Judges of the Department of Labor on March 31, 2016.

13. Complainant's request for hearing was timely.

(Tr. 17-20).

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

Issues Presented

The issues to be decided in this case are: (1) whether Complainant was legally permitted to drive a truck for Respondent on June 3, 2015; (2) whether Complainant was mistaken when he concluded that he was not legally permitted to drive a truck for Respondent on June 3, 2015; (3) whether Respondent instructed Complainant to falsify entries in his logbook so that Complainant might drive more hours that legally permitted; (4) whether Complainant engaged in protected activity within the meaning of the STAA when he told Respondent (orally and/or in writing) that he was not legally permitted to drive a truck for Respondent on June 3, 2015; (5) whether Complainant engaged in protected activity within the meaning of the STAA when he refused to drive a truck for Respondent on June 3, 2015; and (6) whether Complainant suffered an adverse employment action.

Statement of Facts

Respondent is a trucking company located in Coshocton, Ohio.[6] The company has been in existence for approximately 25 years, and employs approximately 135 people.[7] The company has 10 to 12 trucks[8] delivering coal within a 100 air mile radius of its Coshocton yard.[9]

[6] Tr. 48.

Complainant was originally hired by Respondent in the mid-2000s.[10] After some time away from the company, he returned to employment with Respondent in October 2013.[11] It has been stipulated by the parties that Complainant was a "100 air-mile radius driver" as defined in 49 CFR § 395.1(e)(1). Subject to some limitations not applicable to this case, "100 air-mile radius drivers" carrying property: (1) operate within a 100 air mile radius of their normal work reporting locations; (2) depart from, and return to, the work reporting location each work day; (3) work no more than 12 consecutive hours in a work day; (4) have at least 10 consecutive hours off duty separating each 12 hours on duty.

I have reviewed Complainant's driving logs[12] for the last six months of his employment with Respondent (the period December 1, 2014 through June 2, 2015). During that period, Complainant typically drove 5 consecutive days and then was off duty for 2 consecutive days. On only one occasion (February 2 through 7, 2015) did Complainant drive 6 consecutive days.

Memorial Day in 2015 fell on May 25. According to testimony at the hearing, truck drivers employed by Respondent did not work at all on May 23, 24 or 25, 2015. At the end of May 2015, a customer of Respondent called to ask that Respondent deliver coal on an expedited basis during the final days of the month.[13] The parties have stipulated that Complainant worked every day from Tuesday, May 26 through Tuesday, June 2, 2015. According to my review of Complainant's driving logs, this was the only time Complainant had ever worked 8 days in a row. During those 8 days, Complainant never drove more than 11.5 hours in any day.[14] During those 8 days, Complainant had a least 10 consecutive hours off duty between each day of driving.[15] During those days, Complainant drove a total of 69 hours.

At the hearing, Complainant testified that he was limited to driving only 70 hours in an 8-consecutive day period.[16] Complainant identified CX 1 as the regulation he reviewed which caused him to believe that his hours of service were limited to 70 hours over 8 days.[17] The regulation[18] to which Complainant refers states:

> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after –
>
> > (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

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[7] *Id*.113.
[8] *Id*. 114.
[9] *Id*. 49
[10] *Id*. 116.
[11] *Id*. 17-18.
[12] EX M.
[13] Tr. 115.
[14] *Id*. 19.
[15] EX M.
[16] Tr. 82.
[17] *Id*. at 82-83.
[18] 49 C.F.R. §395.3(b). Promulgation of hours of service regulations for the trucking industry has followed a highway fraught with potholes. A useful summary of the history of the regulations (through 2013) can be found in *American Trucking Ass'ns v. Fed. Motor Carrier Safety Admin*., 724 F.3d 243, 245-46 (D.C. Cir. 2013).

> **(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.**

CX 1-2 (emphasis added).[19] The parties agree that this regulation governs.[20]

Complainant testified that when he learned that he was scheduled to work the weekend of Saturday, May 30 and Sunday, May 31, he informed the dispatcher that he would "gladly work"[21] over the weekend, but also told the dispatcher "around Tuesday I'd be pushing my hours where I wouldn't – you know, I'd have to take some time off."[22]

Complainant testified that after expressing concern that he would be "out of hours" if he worked the weekend of May 30 and 31, he received a telephone call from Roxann Hydrosky.[23] Hydrosky was the supervisor of the dispatchers at Respondent's facility.[24] Complainant described the telephone call:

> Q. And did Roxann -- who is Roxann Hydrosky?
>
> A. She was in charge of dispatchers, trucks.
>
> Q. Did Roxann Hydrosky call you?
>
> A. She called me Saturday morning, the 30th, June [sic] 30th.
>
> Q. And can you tell the Court what conversation took place between you and Ms. Hydrosky?
>
> A. She wanted to know why I wouldn't drive. I explained to her that I would be out of hours, and she suggested to me that I not log my book for Saturday and they would take care of my weigh tickets and make them disappear.
>
> Q. And how did you respond to Roxann Hydrosky?
>
> A. I told her I absolutely would not fudge my logbooks.
>
> Q. And what was her reaction?

[19] The testimony at the hearing was that Complainant looked at the Department of Transportation ("DOT") website in order to obtain information about his hours of service requirements. Tr. 82. Complainant identified CX 1 as a print-out of the hours of service information contained on the DOT website at the time he reviewed those requirements. Tr. 82-3. In May and June of 2015 (the time period at issue in this case), application of the version of 49 C.F.R. §395.4(c)(2) contained in CX 1 (containing the words given emphasis in the quoted text above) had been suspended as part of the approval of appropriations for fiscal year 2015 for DOT. *See* 79 Fed. Reg. 76241 (December 22, 2014). In effect in May and June 2015 was the version of 49 C.F.R. §395.3(c)(2) in effect prior to July 1, 2013 (which did not contain the words given emphasis above). 79 Fed. Reg 76241.
[20] Complainant's *Post Hearing Brief* at 3, Respondent's *Post Hearing Brief* at 1.
[21] Tr. 83
[22] *Id.*
[23] *Id.* 84.
[24] *Id.* 56.

A. She said, "I don't understand why you guys want to drive legal now," was her response.

Tr. 84.

Hydrosky testified at the hearing, and denied suggesting that Complainant falsify his log book:

Q. What were you aware of?

A. I was aware that Shawn was saying he was getting close to being out of hours.

Q. And you called Mr. Bates, then, on Saturday, May 30th, 2015; is that correct?

A. It might have -- yes.

Q. And you discussed with him that he would be out of hours on Tuesday of the following week; is that correct?

A. Yes, he said he was, but I said I didn't know what the schedule was going to be then.

Q. You told Mr. Bates not to log in his hours for May 30th, 2015; isn't that correct?

A. No, it is not.

Q. And you told him not to log in his hours so he could continue to work the following week; is that correct?

A. No.

Q. What did you tell him?

A. I told him that I did not know what the schedule was going to be come Tuesday, or even Monday at that time.

Q. And you told him that you would take care of his scale tickets for Saturday, May 30th, 2015; isn't that correct?

A. No.

Tr. 74-5.

Complainant ran out of driving hours at about 10:30 a.m. on Tuesday, June 2, 2015. At that time, he had driven 69 hours over 8 consecutive days. He noted in his log book "70 HRS/8 DAYS Reached."[25] Complainant did not drive any more on that day.

[25] EX M.

During the afternoon of June 2, 2015, several phone calls were made to Complainant to schedule him to work on June 3. EX J is a recording of a voice mail message left on Complainant's phone by Pam Mathias, who was in the Operations and Safety Department of Respondent. A transcription of this message appears at page 124 of the hearing transcript. Mathias testified that Complainant returned her call, and that at the end of their call, Mathias said she would look into Complainant's hours of service issue and call him back.[26]

EX K is a recording of a second voice mail message left by Mathias on Complainant's phone on the afternoon of June 2, 2015. As promised, Mathias had looked into Complainant's hours of service issue, and was calling to tell Complainant that he did have hours available to work on June 3:

> Hey, Shawn, this is Pam calling back. I've probably talked to you more now than I've talked to you since our big days. But, anyway, I did find out some information, kind of just went in search of. On the seven consecutive days doesn't mean a workweek, it means seven -- it means the eight consecutive days and that each eighth day is dropped off. So every time you roll to the next day, the previous eighth day drops off, so you're always running on eight days, if that makes any sense. But, anyway, I'll talk to you tomorrow. Hopefully, you call me back. Bye.

Tr.144.

Complainant did not return Mathias' second telephone call.[27] When his boss learned that Complainant had not returned Mathis call,[28] Dusty Woodie called Complainant. Woodie left the following voice mail message late in the afternoon of June 2:

> Hey, Shawn, this is Dusty. Give me a call. This is my cell phone. Don't be giving it out to a bunch of drivers. I need you to work tomorrow, buddy. I mean, I know it's tough. I know you're tired. I need you to get this message. We need to get this. We need to haul coal while we got coal to haul. So give me a call. Whatever you go to do to make it work, we've got to make it work. We need you to work. So I've got to get the revenue in here while we have the coal to haul. Thanks, Shawn.

Tr.119.

Complainant did not return Woodie's call.[29] At approximately 6:00 a.m. on June 3, Woodie arrived at his office, and noticed that the coal truck normally assigned to Complainant was still in the yard.[30] Woodie then called Complainant. Complainant summarized the call:

> I answered the phone, said "Hello." "Hey, Shawn, this is Dusty, why ain't you at work?" And I told him like I told everybody else, I was out of hours. I could not work. I did not refuse to work. He told me that Coshocton Trucking had no room for me there. And I asked him if he was firing me. He said, "Yeah, you're fired, you've got 30 minutes to come clean your truck out."

Tr.89.

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[26] Tr.144-5.
[27] *Id.* 145.
[28] *Id.* 119.
[29] *Id.* 122.
[30] *Id.*

Woodie's recollection of the call is somewhat different. According to Woodie, Complainant said he was not coming to work, and that he would not falsify his log book entries.[31] Woodie then told Complainant to "take your things out of the truck so we can use the truck."[32] Woodie denies telling Complainant that he was fired during this early-morning call on June 3.[33]

Several hours later, Complainant went to Respondent's yard and removed his belongings from the truck that had been assigned to him.[34] Complainant filed his Complaint with OSHA a few days later.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicable Standards

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity. The employee protection provisions of the STAA[35] are these:

> Prohibitions: (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; (B) the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (C) the employee accurately reports hours on duty pursuant to chapter 315;

Congress amended the STAA on August 3, 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C.A. §42121(b).[36] *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB Jun. 6, 2013); 49 U.S.C. §31105(b). The post-2007 standards of proof apply in this case. I also note the recent decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016). The ARB's decision in *Palmer* will affect all cases (such as this one) where the whistleblower burdens of proof have been drawn from AIR-21.

In order to prove a STAA violation, Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; and (2) that Respondent took an adverse employment action against him, and (3) that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). In this

[31] *Id.* 123.
[32] *Id.*
[33] *Id.* 68.
[34] *Id.* 89-90.
[35] 49 U.S.C. §31105.
[36] Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536.

case, there is no dispute as to element (2) – Complainant was fired by Respondent on July 21, 2014.[37] Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

If Complainant successfully proves that he engaged in protected activity, and also proves that his protected activity was a contributing factor in the decision to discharge him, then Respondent may nonetheless avoid liability if it demonstrates by clear and convincing evidence that the adverse employment action was the result of events or decisions independent of protected activity.[38] Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013). As the ARB explained in *Palmer*:

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Slip opinion at 32.

Claimant Had Hours Available for Him to Drive on June 3, 2015

The regulation which determines whether Complainant had available driving time on June 3, 2015 is 49 C.F.R. §395.3(b). That regulation states:

> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a

[37] Respondent's *Motion for Summary Decision* at paragraph 20.
[38] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after –

> (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
>
> **(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.**

(emphasis added).

The parties have stipulated that Complainant worked the following hours in the 8 consecutive days through June 2, 2015:

Day #1:	Tuesday, May 26, 2015	10.5 hours
Day #2:	Wednesday, May 27, 2015	9.5 hours
Day #3:	Thursday, May 28, 2015	11.5 hours
Day #4:	Friday, May 29, 2015	9.5 hours
Day #5:	Saturday, May 30, 2015	8.5 hours
Day #6:	Sunday, May 31, 2015	5.5 hours
Day #7:	Monday, June 1, 2015	9.5 hours
Day #8:	Tuesday, June 2, 2015	4.5 hours
TOTAL FOR 8 CONSECUTIVE DAYS		**69 hours**

In these 8 consecutive days, Complainant drove a total of 69 hours. The plain reading of the regulation asks one to look back 8 consecutive days from the most recent driving date, and to then see if the driver has logged more than 70 hours. Had Complainant driven on Wednesday, June 3, 2015 (as he was asked to do by Respondent), his range of 8 consecutive days would have begun on Wednesday, May 27, 2015, and stretched through Wednesday, June 3:

Day #1:	Wednesday, May 27, 2015	9.5 hours
Day #2:	Thursday, May 28, 2015	11.5 hours
Day #3:	Friday, May 29, 2015	9.5 hours
Day #4:	Saturday, May 30, 2015	8.5 hours
Day #5:	Sunday, May 31, 2015	5.5 hours
Day #6:	Monday, June 1, 2015	9.5 hours
Day #7:	Tuesday, June 2, 2015	4.5 hours
Day #8:	Wednesday, June 3, 2015	0 hours
TOTAL FOR 8 CONSECUTIVE DAYS		**58.5 hours**

Applying the plain language of the regulation leads to the conclusion that Complainant had 11.5 (70-58.5) hours available to him to drive for Respondent during the 8 consecutive days beginning May 27, 2015 and ending June 3, 2015.

Complainant Did Not Engage in Protected Activity Under 49 U.S.C. §31105(a)(1)(A)(i)

The whistleblower protection provisions of the STAA were enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." *Brock v.*

Roadway Express, Inc., 481 U.S. 252, 258 (1987). The "complaint" clause of the STAA[39] protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or will testify in such a proceeding." The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec'y Jul. 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (ARB Dec. 31, 2002). A complaining employee's complaints should not be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009).

"Internal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial." *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun*, 576 F.3d at 213; *See Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010); *Guay v. Burford's Tree Surgeon's Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008).

I assume (but do not find) that the notation made by Complainant on his logbook on June 2, 2015,[40] as well as Complainant's telephone conversations with Dusty Woodie and Pam Mathias on June 2, represent "complaints" filed by Complainant about perceived safety issues associated with hours of service regulations. However, for the reasons stated above, I do not find there to be any objective basis for the claim that Complainant was out of driving hours. Nor do I find that Complaint's belief that hours of service violations would occur if he drove on June 3, 2015 is reasonable. I make this finding for several reasons.

First, the entire regulation at issue, 49 C.F.R. §395.3(b), is brief and to the point. The entire regulation states:

> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after –
>
> > (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
> >
> > **(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.**

When the obviously irrelevant provisions of the regulation are boiled-out, the language and intent of the regulation is plain: "No driver shall drive a property-carrying commercial motor vehicle having been on

[39] 49 U.S.C. §31105(a)(1)(A)(i).
[40] "70 HRS/8 DAYS Reached."

duty 70 hours in any period of 8 consecutive days." In order to determine whether one is in compliance with the regulation, one needs only to know how many hours have been driven in the 8 consecutive day period which is under consideration. I find the phrase "any period of 8 consecutive days" to be clear, unambiguous, and subject to easy application. The idea that the 8 day periods in the regulation are "rolling" (the oldest day of the period drops off when a new day is added) seems clear from the language "8 consecutive days" used in the regulation. Any person of Complainant's education, training and experience who is contemplating taking serious action (such as putting one's job in jeopardy) should have no difficulty understanding and applying the regulation to their specific situation. I cannot find that Complainant's objectively incorrect concerns about his hours of service were reasonable where, as here, I find that the regulation clearly and unambiguously would have allowed Complainant to drive up to 11.5 hours on June 3, and where, as here, I find there to be no ambiguity or uncertainty in the regulation by which Complainant could have reasonably concluded that he did not have available hours on June 3. In order for Complainant to have concluded that he had no driving hours available to him for June 3, Complainant's review of the regulation could not have been performed in a reasonable manner. I reject Complainant's argument that I hold Respondent legally responsible for Complainant's unilaterally inaccurate understanding and application of the regulation to his situation.

Second, the voicemail message left on Complainant's phone by Pam Mathias on June 2, 2015[41] informed Complainant that he was not properly interpreting the regulation, and invited Complainant to discuss his hours of service with Mathias. As discussed above, Complainant had never before worked 8 days in a row (June 3d would have been the 9th consecutive day), and thus had never had any reason to practically apply the "8 consecutive days" concept contained in 49 C.F.R. §395.3(b)(2). Complainant had never before been anywhere close to working 70 hours in a week, and he thus was not accustomed to calculating his weekly hours of service. Complainant had several opportunities on June 2 to discuss the regulation with Mathias or Woodie and to see how the regulation applied to his driving history. Complainant ignored the multiple opportunities given him on June 2 to discuss his regulatory status. It is possible, and perhaps likely, that Complainant could have been persuaded that his interpretation of the regulation was incorrect had he engaged in a conversation about his driving history. I cannot find that Complainant's objectively incorrect complaints about his hours of service were reasonable where, as here, Complainant intentionally and repeatedly avoided listening to information made available to him about whether there was really going to be an hours of service issue if he drove on June 3. I reject Complainant's attempt to shift legal responsibility for the loss of his job onto Respondent where Complainant failed to engage in a conversation which likely would have allowed him to learn that he had driving hours available to him.

Third, the undisputed testimony at the hearing was that Complainant had attended training and received written materials from Respondent concerning the hours of service regulations applicable to him.[42] When determining whether Complainant acted reasonably in refusing to drive on June 3, I take into consideration that he had received training on the hours of service regulations applicable to him, and that he had been given written training materials explaining those hours of service regulations.

Complainant made a unilateral mistake. He incorrectly concluded that he did not have enough hours to be able to drive on June 3, and, as a consequence, he did not show up for work on that day. He lost his job. I find Complainant ignored the clear language of the regulation and the training given to him by Respondent when he concluded that he could not drive on June 3. I further find that Complainant refused repeated offers made to him to discuss how the regulation might apply to him. On the facts of this case, I do not find Complainant had a reasonable belief that Respondent was attempting to evade hours of service limits when Respondent scheduled Complainant to drive on June 3.

[41] EX K.
[42] Tr.129.

It is clear that no actual violation of hours of service limits occurred. I do not find that Complainant had a reasonable belief that an hours of service issue would occur if he drove on June 3. I thus find Complainant did not engage in activity protected under 49 U.S.C. §31105(a)(1)(A)(i) when he incorrectly noted in his log book that he had reached his hours of service limit, or when he incorrectly told Mathias and Woodie that he did not have enough hours to drive on June 3 .

Complainant Did Not Engage in Protected Activity Under 49 U.S.C. §31105(a)(1)(B)(i)

Complainant may demonstrate that he engaged in protected activity by proof that he refused to drive for Respondent because of safety concerns.[43] A refusal to drive is protected under two provisions. The first provision, 49 U.S.C. §3115(a)(1)(B)(i), deals with "actual violations" of the law and requires Complainant to "show that the operation [of a commercial motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive." *Yellow Freight Sys. v.Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

It is undisputed that Complainant refused to drive on June 3, 2015. However, I have previously found that under the hours of service regulations applicable to him, Complainant could have driven up to 11.5 hours on June 3 without violating the hours of service limitations. There was thus no actual violation of the hours of service regulations (or any other federal safety regulation) when Respondent scheduled him to work on June 3. Complainant did not engage in protected activity under 49 U.S.C. §3115(a)(1)(B)(i) when he refused to drive on June 3.

Complainant Did Not Engage in Protected Activity Under 49 U.S.C. §31105(a)(1)(B)(ii)

The protection afforded to whistleblowers under 49 U.S.C. §31105(a)(1)(B) also includes refusals to drive where the employee has a reasonable apprehension that the operation of a vehicle would cause serious injury to himself or the public because of the vehicle's unsafe condition.[44] "This clause of the STAA covers more than just mechanical defects of a vehicle - it is also designed to ensure "that employees are not forced to commit…unsafe acts " *Canter*, 2009-STA-00054, slip op. at 11 (citing *Garcia v. AAA Cooper Transp*., ARB No. 98 -162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998). The "apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous danger of accident, injury, or serious impairment to health." 49 C.F.R. § 31105(a)(2). In determining whether a "refusal to drive" merits STAA protection, the Court must consider the totality of the circumstances surrounding the refusal. *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000

The record contains no information by which I could find that Complainant had a reasonable apprehension that his operation of a truck on June 3, 2015 would cause serious injury to Complainant or to anyone else. Woodie speculated in his June 2 voicemail that "I know you're tired." [45] However, Complainant did not testify that he was fatigued on June 2, nor did he claim that he would have been so fatigued on June 3 that it would have been unsafe for him to operate his truck. Claimant's refusal to drive on June 3 was not premised on a claim of fatigue (or any other safety-related concern), and I thus find that Complainant did not engage in protected activity under 49 U.S.C. §31105(a)(1)(B)(ii).

[43] 49 U.S.C. §31105(a)(1)(B).
[44]Complainant makes no argument that he engaged in protected activity under §31105(a)(1)(B)(ii). *See Complainant's Post Hearing Brief* at 10, 14-15. I address the matter because EX G contains a reference to Complainant being fatigued.
[45] EX G.

Complainant Did Not Engage in Protected Activity Under 49 U.S.C. §31105(a)(1)(C)

An employer may not retaliate against a trucker because the trucker has accurately reported his hours of service.[46] In this case, Complainant alleges that he was encouraged to submit inaccurate records of the hours he drove on Saturday, May 30, 2015.[47] EX M shows that Complainant reported driving 8.5 hours on May 30, and the parties have stipulated that this record is accurate. Complainant thus "accurately report[ed] hours on duty."

In my decision denying the motions for summary decision,[48] I discussed at some length the "stark temporal proximity" between the alleged suggestion that Complainant falsify his log entries (May 30) and the date on which Complainant last worked for Respondent (June 2). I denied Respondent's Motion for Summary Decision, in part, because I felt I needed more evidence as to whether Respondent retaliated against Complainant because Complainant did not falsify his log entries. Complainant testified that he told Woodie that he had been instructed to falsify his logbook entries and, according to Complainant, it was Woodie who fired him. I expressed concern in my Summary Decision Order whether Complainant had been retaliated against for making an oral report to Woodie about falsifying his hours of service.[49]

As noted above, Roxann Hydrosky – the employee of Respondent who is said to have suggested to Complainant that he falsify his logbook entries – testified as a witness in the formal hearing. Hydrosky denies suggesting that Complainant falsify his logbook.[50]

I find that Complainant was not asked or directed by Roxann Hydrosky (or any other employee of Respondent) to enter inaccurate information on his driving logs. I thus find that Complainant did not engage in protected activity when he entered accurate information into his logbook. I find that Complainant did not engage in protected activity when he told Woodie that he had been instructed to falsify his logbook entries, because I find no such instruction was ever given.

In resolving the credibility dispute between Complainant and Hydroxy, I have taken into consideration a number of factors.

First, I credit Hydroxy's simple and logical explanation for why she would not have given such an instruction to Complainant on Saturday, May 30. Complainant says that when he spoke with Hydroxy on Saturday, May 30 he told her that "around Tuesday" (June 2) he would "probably be pushing my hours."[51] Complainant testified that Hydroxy "suggested to me that I not log my book for Saturday."[52] Hydroxy later testified that as of Saturday (May 30), she did not know whether Complainant would be scheduled to work either on Monday (June 1) or Tuesday, June 2.[53] There is no reason why Hydroxy would have told Complainant to falsify his logbook entry for Saturday, May 30 when Complainant had told her he would not run out of hours until Tuesday, June 2, and when it was unknown on May 30 whether Complainant would ever be working on June 1 or 2. So far as Hydroxy knew on May 30,

[46] 49 U.S.C. §31105(a)(1)(C).
[47] Tr. 84.
[48] *Decision and Order Denying Shawn Bates and Coshocton Trucking's Motions for Summary Decision* (issued November 1, 2016) at p. 5
[49] *Id.*
[50] Tr. 74-5.
[51] *Id.* 83.
[52] *Id.* 84.
[53] *Id.* 75.

Complainant may not be "pushing his hours" on June 2, because Complainant might not be scheduled to work on June 1 or 2.

Second, I carefully observed the demeanor of Complainant and Hydroxy as they testified during the hearing. I find Hydroxy was credible as a witness. I found Complainant to still be extraordinarily angry about his work experience with Respondent, and I believe that anger colored Complainant's testimony.[54] On this particular point, I find Hydroxy to be credible, and I find Complainant not to be credible.

I am aware that Hydroxy has a prior felony conviction, and that she spent some time in prison.[55] I almost entirely discount her conviction when evaluating her credibility. Hydroxy testified as a witness, and I had the opportunity to evaluate her testimony as she sat on the witness stand. I know nothing about the circumstances of her conviction, and, without knowing a great deal more, the mere existence of the conviction means substantially less than my own observations of the witness when I am asked to assess her credibility.

For the foregoing reasons, I find that Complainant did not engage in any activity protected by the STAA. Because he has failed to prove this essential element of his case by a preponderance of the evidence, his claim fails.

Complainant Did Not Suffer An Adverse Employment Action

Complainant's claim fails because I have determined above that Complainant did not engage in any activity protected by the STAA. I alternatively find that Complainant's claim fails because he did not suffer an adverse employment action.

Complainant alleges that Woodie fired Complainant during their telephone conversation on the morning of June 3, and then told Complainant to come to Respondent's yard to clean out his truck.[56] Woodie agrees that he told Complainant to come clean out his truck,[57] but denies telling Complainant that he was fired.[58]

Complainant did go to Respondent's yard on June 3 to clean out his truck. However, Complainant made that trip only after asking a local law enforcement officer to accompany him.[59] Complainant explained his decision as follows:

> Q. Why did you feel it necessary to call a deputy sheriff to accompany you to Coshocton Trucking that morning?

[54] One example: Complainant was asked whether he would be willing to return to work at Respondent's trucking company. Complainant said that he would not. Tr. 94. On the cold page of the transcript, this question and answer are emotionless. However, my observation during the hearing when this question was asked and answered, Complainant was extraordinarily angry.
[55] *Id.*
[56] "I asked [Woodie] if he was firing me. He said 'Yeah, you're fired, you've got 30 minutes to come clean your truck out." *Id.* 89.
[57] Woodie testified that Respondent had only a limited number of trucks configured to haul coal (Tr. 114), and that Complainant was asked to remove his belongings from the truck so that someone else might drive it. *Id*. 127.
[58] *Id*. 68.
[59] *Id.* 89-90.

A. So I wouldn't get accused of stealing anything, doing any property damage, and for my protection.

Q. Why would that have been for your protection?

A. Dusty Woodie and Jim Woodie both have a very, very short fuse.

Tr. 107.

Woodie testified that when Complainant arrived at the yard with a law enforcement officer, he concluded that Complainant was quitting his job.[60]

On June 3, 2015, a document entitled "Termination of Employment Notification" was prepared by Respondent.[61] A check-mark appears next to the word "Quit." The narrative explanation says: "Refused to work. Statement made 'Out of HOURS and he was not going to loose license - - - he would quit first.'" (emphasis and misspelling in original). This exhibit suggests to me that Respondent interpreted the totality of Complainant's actions on June 2 and 3 as a decision by Complainant to quit his job. The following evidence supports Respondent's view:

First, as discussed above, Complainant passed on several opportunities to discuss his hours of service with Mathias and Woodie. Complainant said he refused to return the calls made to him on June 2 because "I was done talking to them."[62] Based upon these facts, I conclude it was the actions of Complainant, rather than the actions of Respondent, which ultimately ended the employment relationship.

Second, based upon his education, training and experience, and based on the voicemail left by Woodie explaining the urgency to get the customer's coal delivered,[63] Complainant certainly understood that if he failed to appear for work on June 3 that there would be repercussions related to his job. From Respondent's point of view, Complainant had hours available to drive, and the importance of having him at work on June 3 had been explained to Complainant.

Third, instead of going to Respondent's yard on the morning of June 3 and having a discussion with Woodie or Mathias about his hours of service concerns, Complainant failed to appear for work on that morning. When Woodie called him early on the morning of June 3, Complainant did nothing to attempt to resolve any concern about whether he had hours available to work on that day. Based upon these facts, I conclude it was the actions of Complainant, rather than the actions of Respondent, which ultimately ended the employment relationship.

Fourth, Complainant never made any attempt on or after June 3 to resolve any issues related to his employment status. As noted above, it was my observation that Complainant remained very angry about his employment situation even at the time of the formal hearing. Based upon these facts, I conclude it was the actions of Complainant, rather than the actions of Respondent, which ultimately ended the employment relationship.

[60] Id. 127.
[61] EX N.
[62] Tr. 103.
[63] EX G: "I need you to work tomorrow . . . I need you to do this – we need to haul coal while we got it to haul buddy . . . . [W]e gotta make it work, we need you to work."

Fifth, I find Woodie's testimony about his June 3 conversation with Complainant more credible than Complainant's testimony about that conversation. I make this credibility determination after my careful observation of both witnesses as they testified. Based upon the totality of the evidence, and based upon the actions taken by Complainant and Woodie during June 2 and 3, 2015, I find that Woodie never told Complainant that he was fired. Based upon his own testimony ("I was done talking to them"), I find that on June 2 and 3, 2015, Complainant was incapable of having a dispassionate conversation about whether he had sufficient hours available to him to drive on June 3. I find that on those days, Respondent urgently wanted Complainant to work so that coal could be delivered as scheduled. I have previously found that there was no legal reason why Complainant was unable to drive on June 3. I find that the only reasons why Complainant did not drive on June 3 was because of Complainant's unilateral mistake as to the hours of service regulations, and because of his repeated unwillingness to allow anyone to educate him that he was able to drive on June 3. I find that on June 2 and 3, 2015, Respondent was powerless to persuade Complainant to return to work. Under these circumstances, I conclude it was the actions of Complainant, rather than the actions of Respondent, which ultimately ended the employment relationship.

Sixth, Complainant had already decided to stay home from work on the morning of June 3 before the telephone conversation where Complainant alleged Woodie fired him. As a consequence of Complainant's decision not to go to work on the morning of June 3, I believe it was reasonable for Respondent to conclude that Complainant was abandoning his job, and that there was nothing Respondent could do to get him to return.

I am aware of precedent from courts and the Board describing "constructive resignations," which are generally understood to have occurred in cases where an employee abandons his job without formally resigning, and the employer then treats the abandonment as a formal resignation.[64] I am aware of those cases where the Board has concluded that adverse employment action has occurred where, in the absence of a formal resignation, the employer unilaterally concludes that an employee has resigned. [65]

This matter is factually distinguishable from other constructive resignation cases. By any objective standard, Respondent was not violating the hours of service regulations when it assigned Complainant to drive on June 3. Complainant's belief that he was not permitted to drive on June 3 was incorrect and unreasonable. Two employees of Respondent attempted to discuss Complainant's hours of service with Complainant, but Complainant refused to return their calls. Acting solely upon his mistaken belief that he did not have hours available to drive, Complainant did not come to work on June 3. At no time on June 2 or 3, and at no time thereafter, did Complainant respond to Respondent's repeated requests that Complainant come to work. On the facts of this case, I find that Respondent took every action reasonably available to it to try to address and resolve Complainant's mistaken hours of service belief, and that Complainant refused those requests. Respondent was reasonable in concluding that Complainant had abandoned his job for no valid reason. Respondent was reasonable in concluding that no amount of unrequited communication was ever going to entice Complainant to come back to work.

Unlike the facts in *Minnie* and *Klosterman*, where the employer had failed to address safety concerns which were pending when the employee refused to drive, here it is only Complainant who refused to discuss the hours of service issues that were of concern to him. Where, as here, an employee refuses to listen to information proffered by an employer which would contradict an objectively incorrect understanding of a safety regulation, and where the employee refuses to drive because of his unilateral mistake as to the regulatory requirements of his job, I believe no actionable "constructive resignation" occurred when Respondent concluded that Complainant was never coming back to work, and that he had

[64] *See, e.g., Dixon v. City of New Richmond*, 334 F.3d 691, 695 (7th Cir. 2003).

[65] *Klosterman v. E.J. Davies, Inc*. ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Dec. 30, 2010); *Minnie v. Star Air, Inc.,* ARB No. 05-005, ALJ No. 04-STA-26 (ARB October 31, 2007), slip op. at 14.

thus resigned. Respondent wanted Complainant to drive. There was no legal reason for Complainant not to drive. Complainant refused to engage in a conversation with Respondent.

I am asked in this case to determine whether Respondent should be required to pay substantial money damages to Complainant as a consequence of Complainant losing his job with Respondent. The facts of the case are straightforward: Complainant was not scheduled to drive in violation of the hours of service regulations applicable to him; Complainant unilaterally misunderstood how to calculate his hours of service; Complainant was aware that Respondent believed he did not understand how to calculate his hours of service; Complainant refused to discuss the calculation of his hours of service; Complainant refused to come to work on June 3. Under the circumstances of this case, I find it was the actions of Complainant, rather than actions of Respondent, which resulted in the termination of Complainant's employment. I find Complainant has failed to prove by a preponderance of the evidence that he suffered an actionable adverse employment action under the STAA.

Complainant has failed to prove by a preponderance of the evidence that he engaged in protected activity, and his claim thus fails. Alternatively, Complainant has failed to prove by a preponderance of the evidence that he suffered an actionable adverse employment action. His claim also fails for that reason. As a result of these findings , I am not required to determine whether there is a causal connection between the alleged protected activity and the alleged adverse employment action.

ORDER

Complainant's claim is hereby **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

Digitally signed by Steven D. Bell
DN: CN=Steven D. Bell, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Steven D. Bell
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.
An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even 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 notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).