U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 07 August 2017

Case No.: **2016STA00015**

In the Matter of:

WYATT DAVENPORT,
Complainant,

v.

LTI TRUCKING SERVICES, INC.,
Respondent.

Appearances:

Wyatt Davenport, Pro se
Kansas City, Missouri
For the Complainant

Jill R. Rembusch, Esq.
Summers Compton Wells LLC
St. Louis, Missouri
For the Respondent

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

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 implementing regulations[2] 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, Wyatt Davenport (the "Complainant" or "Mr. Davenport"), alleges that he was terminated from his position as a truck driver for the Respondent, LTI Trucking Services, Inc. (the "Respondent" or "LTI") because he made complaints about the safety of the equipment he was assigned to drive.

[1] 49 U.S.C. § 31105 (2015).
[2] 29 C.F.R. Part 1978 (2015).

I. STATEMENT OF THE CASE

On October 16, 2015, the Complainant filed a complaint against the Respondent with the Occupational Safety and Health Administration ("OSHA"), alleging retaliation against him in violation of the STAA. The Complaint states that the Complainant was terminated for reporting a work related injury and raising safety concerns of an exhaust leak in his assigned truck.

On January 14, 2016, OSHA issued its findings on the Complaint. It determined that the Complaint was timely filed and that Complainant and Respondent are covered by the STAA. OSHA noted that the Complainant alleged the Respondent terminated his employment for raising concerns related to commercial motor vehicle safety. However, it found no reasonable cause to believe that Complainant's protected activity contributed to his termination. It therefore dismissed the complaint. Complainant objected to the determination and requested a hearing on February 10, 2016.

I conducted a hearing on this claim on November 2, 2016, and April 17, 2017, in Kansas City, Missouri. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges. [3] At the hearing, I admitted Complainant's Exhibits ("CX") 1–13, Respondent's Exhibits ("RX") 1 and 2, and Joint Exhibit ("JX") 1, without objection, or over the other party's objection. 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 hearings, and the arguments of the parties.

II. ISSUES

The issues in this case are whether the Respondent violated the STAA and, if so, what remedies should be awarded.

III. APPLICABLE STANDARDS

The Employee Protection section of the STAA provides:

§ 31105. Employee protections

(a) 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

[3] 29 C.F.R. Part 18A.

(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

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.[4]

This 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]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the

[4] 49 U.S.C. § 31105(a).
[5] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

21st Century ("AIR 21").[6] In order to prevail on his case the Complainant must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to the Respondent to show by clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.[7] Thus LTI can prevail if it demonstrates either that Davenport cannot establish one of the three listed elements, or that LTI would have taken the action it did regardless of his protected activity.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. SUMMARY OF THE EVIDENCE

1. Mr. Davenport's November 2, 2016, Hearing Testimony

Mr. Davenport testified before me at the hearing in Kansas City, Missouri on November 2, 2016. At the time of the hearing he was 50 years old. Transcript ("Tr.") 16. He has an eleventh grade education. Tr. 16. He has held a Class B commercial driver's license since 1994, and a Class A commercial driver's license since 2007. Tr. 20. He began working for LTI in April 2015. Tr. 18. He worked as an over-the-road truck driver. Tr. 19. He stated that he:

> [W]as illegally fired, wrongfully terminated on the 16th of October, after numerous – after numerous complaints of different illnesses, of getting sick; I lost ten to fifteen pounds; excruciating pain. I couldn't even sleep. I couldn't eat. I couldn't do anything. I couldn't even do my job functions, and they had been knowing it for five months.

Tr. 18. Mr. Davenport testified that he worked for LTI for six months and was ill for five of those months. Tr. 18. At the time of the first hearing he was working as a janitor or service tech for Jackson County. Tr. 17. Prior to his employment with Jackson County he drove a truck for "about a month" for Trucking Experts in Markham, Illinois. Tr. 19. He testified that "[i]t was more like an owner-operator type of deal, and it didn't work out too well." Tr. 19. He testified that "They didn't want to pay me my money and they fired me." Tr. 76.

The first truck Mr. Davenport drove during his employment with LTI was a 2012 Volvo. Tr. 18, 26. He testified that he believes LTI knew it "had issues" because when he was initially assigned the truck the shop manager said "Oh, we've got a very special truck for you." Tr. 18. He did not want to drive the truck because he "don't like particularly driving Volvos or automatics." Tr. 19. A dispatcher would assign Mr. Davenport his truck routes. Tr. 21. Mr. Davenport drove the first truck he was assigned to for about two weeks. Tr. 27. He complained that the truck was causing headaches and a burning sensation in his nose. Tr. 27. The company "took [him] out of the truck" after he complained. Tr. 27. An exhaust leak was discovered in the truck. Tr. 31.

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[6] 49 U.S.C. § 42121(b) (2014). *See* 49 U.S.C. § 31105(b)(1).

[7] 49 U.S.C. § 42121(b)(2)(B); *Powers v. Union Pacific Railroad Company*, ARB Case No. 13-034 (FRS) (ARB March 20, 2015, reissued with full dissent, April 21, 2015), PDF at 10–11.

The second truck LTI assigned Mr. Davenport was a 2015 Freightliner. Tr. 26. The truck had 33,000 miles and was fairly new. Tr. 27. The truck had some damage from the previous driver. Tr. 27. About four days after being assigned to drive the Freightliner, Mr. Davenport began to experience symptoms and suspected another exhaust leak. Tr. 29. He said that he "started having the same symptoms as I drove the first truck." Tr. 29–30. The tip of his nose was burning and he was experiencing headaches. Tr. 30. He informed the dispatcher of his symptoms. Tr. 30. The dispatcher had Mr. Davenport take the truck to a shop while he was on the road. Tr. 30. The shop found nothing wrong with the truck. Tr. 30. He drove the truck for a couple more weeks and then again experienced headaches and a burning nose. Tr. 30. On one particular day, he turned on the defroster and the truck filled with fumes and he almost passed out. Tr. 30. Mr. Davenport informed LTI of the problems with the truck "at least two or three times a month." Tr. 30. He testified that LTI ignored his complaints. Tr. 30. In July, LTI performed regular maintenance on the truck and found no problem. Tr. 31. After the regular maintenance, "it started getting worse." Tr. 31. He began to have constipation, upset stomach, diarrhea, tightness of the chest, shortness of breath, and body aches and pains. Tr. 31–32. He said that he kept reporting to LTI that something was wrong with the truck, but they would not listen. Tr. 32. Mr. Davenport testified that he:

> [W]as fine before I started working for the company. I didn't know what was going on, the illness and stuff. I didn't know. And they let me stay in the truck for numerous – for five months. I have documentation. I know where places were that I took the truck. There were other issues with the APU unit where I was in Sikeston, I do believe, Sikeston, Missouri during – in the month of June, waking up. The idle, the APU unit also had something wrong with the battery. The APU unit, where I was waking up in the middle of the day while I was trying to sleep in 90 degree weather, sweating profusely, and all that is a contributing factor of what took place while I was driving the truck.

Tr. 22. A Truck's APU unit is involved with heating and cooling in the truck. Tr. 28. Mr. Davenport testified that the truck was serviced nine times. Tr. 22. He stated that fumes would fill the cab of his truck and he would almost pass out. Tr. 24. He complained of nausea, headaches, and almost blacking out while driving due to the fumes. Tr. 24. He continued to drive the truck and his symptoms continued to worsen. Tr. 35. Mr. Davenport saw a doctor for the first time in "probably July or August" and "they didn't find anything." Tr. 32–33.

The last time Mr. Davenport drove for LTI was October 1, 2015. Tr. 36, 52. He was driving from Memphis, Tennessee and almost passed out. Tr. 36. He informed the dispatcher that he was sick and decided to pull into a shop and have the truck checked. Tr. 36. The shop found nothing wrong with the truck. Tr. 38. He returned to LTI on October 4, 2015. Tr. 39. Upon his return, LTI checked the truck and also found nothing wrong. Tr. 39. Mr. Davenport then asked that they check the batteries. Tr. 40. Upon inspecting the batteries, LTI discovered a defective battery. Tr. 40. Mr. Davenport told them he had "been exposed to sulfuric acid all of this – so I've been exposed to sulfuric acid." Tr. 40. He informed LTI that he was going to the hospital. Tr. 40. On Monday October 5, 2015, he went to the Gateway Regional hospital in Granite City, Illinois. Tr. 41. LTI paid for the hospital visit. Tr. 42. After the hospital visit, Mark Wandersee,

an employee of LTI, referred Mr. Davenport to Ms. Natalie Menossi.[8] Tr. 43. He saw Ms. Menossi and told her that he had been coughing up blood. Tr. 47. She informed him that his illness was pre-existing. Tr. 47. "How is being exposed to poison pre-existing?" he asked. Tr. 47. Mr. Davenport testified that "right then I knew that it was a setup now, that I was referred to her by LTI for just that reason, to hinder me from trying to get well." Tr. 47. Ms. Menossi referred Mr. Davenport to another doctor who diagnosed him with gastritis. Tr. 49. He was under the impression the other doctor was going to perform an EGD, but did not. Tr. 50. He said "[i]t was all a plot from LTI through Ms. Menossi to hinder [him] from getting the proper medical evaluation." Tr. 50. Mr. Davenport filed a malpractice claim against Ms. Menossi. Tr. 48. On October 12, 2015, Mr. Davenport went back to the emergency room because he was still having problems. Tr. 44. He was experiencing headaches, chest pain, and he could hardly breathe. Tr. 46. The emergency room doctor contacted poison control and referenced internet articles and learned that sulfuric acid could stay in one's system for two months. Tr. 44. He stated that he had seven of eleven symptoms associated with exposure to sulfuric acid. Tr. 44. Later, Mr. Davenport had a gastric biopsy performed in Kansas by Dr. Ivan Elias. Tr. 50–51. Mr. Davenport testified that he was diagnosed with H-Pylori. Tr. 58. He said H-Pylori "is a bacteria in the stomach, and if left untreated, which they did not try to help me get well immediately, it can lead to stomach ulcers and also stomach cancer." Tr. 58.

At some point after Mr. Davenport went to the emergency room, LTI contacted him and informed him that he could no longer drive or use his truck, but he could use the company van. Tr. 53. Mr. Wilson took the keys from Mr. Davenport and refused to even allow him to park the truck. Tr. 54. Mr. Wilson informed Mr. Davenport that LTI was going to send him home. Tr. 54. Mr. Davenport informed Mr. Wilson that his doctors were located in the local area. Tr. 54. He asked if he was being fired. Tr. 54. He also asked for a hotel room to stay in while sought medical treatment. Tr. 54. He cleared out the truck and left. Tr. 54. He testified that he received unemployment benefits. Tr. 65. He testified "if I would have quit, I wouldn't have received unemployment, so I had to be fired. They didn't hesitate to give me unemployment." Tr. 65.

Mr. Davenport paid for all his own medical bills except for the first emergency room visit. Tr. 45. Jessica Richtor, from Great West Casualties, contacted Mr. Davenport and informed him that they would not provide any compensation due to his pre-existing condition. Tr. 45. Mr. Davenport testified that someone at LTI had informed Ms. Richtor of a pre-existing condition. Tr. 45. He denied having any pre-existing condition to Ms. Richtor. Tr. 45.

Mr. Davenport applied for many jobs after LTI. Tr. 60. He stated that Melson Transportation refused to hire him because LTI informed them that he had a "pre-existing condition." Tr. 60. In a subsequent conversation, Melson Transportation clarified that they were informed that he had a pre-existing case with Workmen's Comp. Tr. 60. He did not keep records of the jobs he applied for, but stated that he has applied for "so many jobs." Tr. 76–77.

[8] At the time the Complainant believed Ms. Menossi to be a physician, but she was in fact a physician's assistant. *See* RX 1.

2. Mr. Davenport's April 17, 2017, Hearing Testimony

Mr. Davenport testified that LTI failed to disclose documents that demonstrated all the occasions that his trucks were checked for trouble. Tr. 129–130. He asked that I "consider the fact that they did not provide [him] with all of the service records that [he] requested." Tr. 131. Mr. Davenport attested that LTI failed to provide all of the reports about the maintenance performed on his truck. Tr. 147. Some reports were provided, but others were not. Tr. 147. He noted a missing report from service in Altoona, Iowa associated with his truck's APU unit. Tr. 147. He testified that before that service stop he was "smelling rotten eggs" and was exposed to battery fumes from the bad batteries in the APU. Tr. 147.

Mr. Davenport stated that he was mistaken during his previous testimony about Ms. Menossi's status as a doctor. Tr. 140. He testified that she was a nurse practitioner at Heartland Health Care. Tr. 140. He reported that "she didn't put all of [his] complaints down, but [he] realized that she was already on the side of LTI…." Tr. 140. She omitted the fact that he was coughing up blood. Tr. 140. The information in Ms. Menossi's report was inaccurate and she omitted information. Tr. 142. Mr. Davenport disagreed with Ms. Menossi's assessment that his condition was pre-existing. Tr. 144. He stated that he had previously driven for other companies and never complained. Tr. 144. He stated that he did his job without accidents or tickets. Tr. 145. His out of pocket medical bills totaled to about $4,000.00. Tr. 155, 157.

The first truck LTI assigned Mr. Davenport to drive was a Volvo, number 7024. Tr. 220. After driving the truck for two or three weeks he reported that his nose was burning and he was experiencing headaches. Tr. 220. He testified that he took the truck to a service station in Wheeling, West Virginia and they confirmed that it did have an exhaust leak. Tr. 220. The second truck Mr. Davenport was assigned to drive was in disrepair and was damaged. Tr. 149. There was a peculiar odor in the truck. Tr. 149, *see also* 220. He believes LTI knew something was wrong with the truck before they assigned it to him. Tr. 149. He reported smelling gas fumes and recalled that a service report noted "codes of fuel fluctuated between high pressure and low pressure in the fuel gauge." Tr. 149–150. He testified that he almost passed out on two occasions while driving the truck. Tr. 150. He said "[o]ut of all the complaints, out of all the times I complained about it, they just kept me in it for some reason instead of giving me another truck or whatever, and couldn't find the problem." Tr. 151. Three days after he began driving the second truck he began to experience a burning nose and headaches. Tr. 221. That is when his health began to decline. Tr. 221. He testified that LTI did not care that he was sick and sent him away to avoid liability. Tr. 222.

Mr. Davenport testified that Trucking Experts released him after getting his work history from LTI. Tr. 159. He stated that he applied for many jobs after LTI. Tr. 176. He has applied to temporary service jobs. Tr. 179. He reported that another company, Cook Trucking, was ready to hire him, but decided not to. Tr. 176. He speculated that the decision was due to Cook Trucking speaking with someone from LTI. Tr. 176. He testified that he no longer had a job with Jackson County. Tr. 158. He worked there for two and a half months. Tr. 178. He said he felt too bad because of his gastritis and had trouble getting enough hours. Tr. 158. He testified that "sometimes I have energy and sometimes I don't with the acute gastritis." Tr. 178.

Mr. Davenport agreed that he smoked steadily since he was a teenager. Tr. 187. He has had tuberculous most of his adult life. Tr. 188. After he saw Ms. Menossi she did not release Mr. Davenport to return to work. Tr. 189. She informed him that he would need to see his primary care physician to be released to return to work. Tr. 189. He informed LTI that he was unable to work due to his illness. Tr. 191. He testified that Mr. Wilson called him into his office and fired him. Tr. 192. Mr. Davenport testified that Mr. Wilson told him to get out, clear his stuff out of the truck, and that LTI was releasing him. Tr. 192. Mr. Davenport agreed that at the time, Mr. Wilson did inform him that LTI was releasing him until he was better. Tr. 193. But said that Mr. Wilson was "just telling me that he was firing me." Tr. 194. LTI refused to put him into a hotel room until he was better. Tr. 194. He said they would not put him in a hotel room because they were firing him. Tr. 195. Mr. Wilson offered Mr. Davenport a bus ticket home. Tr. 195. He stated:

> [T]here was no use for me trying to come back and work for the company after – they wasn't trying to help me then. Why would I want to come back and be endured to some – to some more suffering?

Tr. 195. Mr. Davenport rejected the bus ticket because he felt "it was just a way of just firing me." Tr. 197.

Mr. Davenport agreed that his doctor told him that an H. pylori infection occurs when a type of bacteria affects your stomach. Tr. 198. His doctor prescribed antibiotics to treat the infection. Tr. 200. Mr. Davenport contended that the exposure to fumes in his truck weakened his immune system and caused him to contract the H. pylori infection. Tr. 201.

When Mr. Davenport believed there was a problem with his truck he took it to a mechanic. Tr. 203. He did not work on the truck himself. Tr. 203. He is not a mechanic. Tr. 204. He informed LTI that there was an exhaust smell in his truck. Tr. 205. Within one month of working for LTI he complained of an exhaust smell in his truck. Tr. 206. LTI assigned him a different truck. Tr. 206. He then began complaining about an exhaust smell in the second truck. Tr. 207. Every time he complained LTI allowed him to have the truck checked. Tr. 207. LTI also performed preventative maintenance on the truck. Tr. 207. On August 10, 2015, a third party checked the truck and found no exhaust leaks and certified the batteries as good. Tr. 209. A cracked battery was discovered in the truck on October 5, 2015. Tr. 210.

3. Matthew Wilson's April 17, 2017, Hearing Testimony

Mr. Wilson is Director of Safety at LTI. Tr. 230, 245. He started working for LTI September 16, 2015. Tr. 245. Mr. Wilson testified that he knew Mr. Davenport as a driver at LTI and was familiar with his complaints about the trucks he was assigned to drive. Tr. 230. The first time Mr. Davenport complained about an exhaust leak, the truck was inspected and no leak was found. Tr. 230. He testified that there had been an exhaust leak in that truck in March 2015. Tr. 272. LTI decided to assign Mr. Davenport to a different truck. Tr. 230. Mr. Davenport complained multiple times that the next truck also had an exhaust leak. Tr. 231. No exhaust leak was ever found in the truck. Tr. 231. A cracked battery was discovered on October 5, 2015. Tr. 233. The batteries are in a sealed compartment under the vehicle. Tr. 234. Mr. Wilson

testified that Federal Motor Carriers Safety Administration requires all drivers to perform safety checks on their truck, which includes checking the batteries. Tr. 232. All together Mr. Davenport filed nine complaints about the two trucks he drove. Tr. 259.

Mr. Wilson learned that Mr. Davenport was receiving medical care. Tr. 236. He testified that Ms. Menossi does not work for LTI nor is she on its payroll. Tr. 236. He agreed that it is common for a company to send all of its employees to one clinic for medical treatment. Tr. 236. He further testified that LTI sends its drivers to Gateway Medical for treatment, and if they are out on the road they send them to medical facilities operated by Concentra. Tr. 253.

Mr. Wilson testified that LTI was informed by Mr. Davenport's treating physician that he was not cleared to return to work. TR. 237. He stated this was consistent with what Mr. Davenport had told him. Tr. 237. He agreed that Mr. Davenport informed him that he had been taken off work for at least one week. Tr. 237. Mr. Wilson stated that if an employee is

> going to return to work and it is a short period of time, we will allow them to stay in the truck until they get through that short period of time. If it – if it – an example would be a driver having high blood pressure, then you get their blood pressure under control before we allow them to continue driving. With that said, if there's a driver who has any kind of long-term or personal illness that prevents them from driving, what we will do is, we will send them home until they get released by their personal primary care giver, and once that happens, then we will have them undergo a physical, and then once they pass the physical, we will allow them to drive again.

Tr. 238. He agreed that this was what he was trying to do with Mr. Davenport. Tr. 238. He advised Mr. Davenport that he was sending him home until he was able to return to work. Tr. 238. Mr. Wilson told Mr. Davenport that he would need a physical before he could return. Tr. 260. Mr. Davenport asked to stay in a hotel until he could return to work, but Mr. Wilson denied this request. Tr. 238–239. He was unsure of the amount of time Mr. Davenport was going to be off work and it would not have been financially feasible. Tr. 239. He asked Mr. Davenport to clear out his truck and turn in his keys. Tr. 239. Mr. Wilson offered Mr. Davenport a bus ticket home. Tr. 239. When asked how Mr. Davenport responded to being sent home he answered:

> He got very upset, accused me of firing him, and he went back to his truck. He started his truck after I told him that he could not leave. I asked him to give me back the keys. He got upset again. As I was talking to him about getting him a bus ticket, he wouldn't listen to me. He kept walking away from me. He said he didn't need anything and – and – and then, I'm thinking if I can remember, he said somebody was going to come get him, and so I left.

Tr. 239. He testified that LTI does not permit drivers to drive if they are not medically released to work. Tr. 240. He agreed that Mr. Davenport was very angry and told him to get away from him. Tr. 240.

LTI received an email from Jessica Richter on October 19, 2015, a few days after sending Mr. Davenport home. Tr. 240. In the email she informed LTI that Mr. Davenport reported headaches and chest pains and that he was "trying to do this the right and legal way. Understand a lot more why people get AK-47's and go off." Tr. 242. When Mr. Wilson read this he was concerned. Tr. 242. He contacted the police to find out if any precautions should be taken. Tr. 255. LTI subsequently made the decision that in the event that Mr. Davenport did contact LTI about returning he would not be permitted to do so. Tr. 242. LTI never heard from Mr. Davenport. Tr. 243. He never directly or through any representative asked to return to work. Tr. 243. He never provided any sort of medical release permitting him to return to work. Tr. 243. Mr. Wilson agreed that his only option was to not permit Mr. Davenport to return to work until LTI had a medical release. Tr. 243. However, the last communication that Mr. Wilson had with Mr. Davenport was to "get better and come back." Tr. 264.

4. Medical Evidence and Treatment Records

The parties submitted Mr. Davenport's treatment records in to evidence. Records from Swope Health Services appear in CX 1. Records from Lab Corp appear in CX 2. Records from the Gateway Regional Medical Center appear in CX 8 and RX 1. Records from the Gateway Regional Medical Center appear in RX 1. Records from Glen Carbon Heartland Healthcare appear in CX 9 and RX 1.

Mr. Davenport reported abdominal pain while at an office visit at Swope Health Services on February 24, 2015. CX 1. He reported waking up with the pain in the morning. He reported that he had pain approximately 30 minutes after eating. The assessment included abdominal pain. CX 1.

Mr. Davenport had two visits to the emergency room at the Gateway Regional Medical Center on October 5, 2015, and October 12, 2015. CX 8. The diagnosis for the October 5, 2015, visit was "Malaise & Fatigue; TOXIC EXPOSURE BY HISTORY." The diagnosis for the October 12, 2015, visit was atypical chest pain. CX 8.

On October 15, 2015, Mr. Davenport was examined by Natalie Menossi, a physician's assistant at Glen Carbon Heartland Healthcare. CX 9; RX 1. His chief complaints were chest pain and headaches. She conducted a physical exam of Mr. Davenport. Her assessment included atypical chest pain, nausea, and an abnormal electrocardiogram. CX 9; RX 1. Under her assessment she wrote:

> Patient continues to complain of chest pain. EKG at the ER this week was normal, as well as set of cardiac enzymes x 1 normal. However, the patient does have positive family hx [history] of CAD and he had never had cardiac w/u [work up] himself. It's appropriate to evaluate him cardiac wise at his age and sx [symptom] presentation. A treadmill stress at SLHV is ordered. With patient's persistent complaints that involve cardiac w/u, I cannot clear him to drive a truck at this time. He will be placed off work until cardiac stress testing results are back and received….

RX 1.

Ms. Menossi ordered that Mr. Davenport have an upper GI study on October 21, 2015, at the Gateway Regional Medical Center. RX 1. The impression included prominence of gastric mucosa in the stomach which could be related to gastritis without evidence of hiatal hernia or gastroesophageal reflux. RX 1. Mr. Davenport also had a stress test that showed good functional capacity. RX 1.

Mr. Davenport saw Ms. Menossi again on November 6, 2015. CX 9; RX 1. His problems included "multiple joint pain" and "effect to exposure to external cause." She reviewed his medications and past medical history. Mr. Davenport reported fatigue, irritation, difficulty smelling, sore throat, chest pain with breathing, burning respirations, nausea, pain with urination, muscle aches, joint pain, and frequent severe headaches. Mr. Davenport also reported "sleep disturbances at times in truck due to toxic smells or hot temps." Mr. Davenport reported five months of exposure to sulfuric acid from a leaking battery. She noted that no "serum/blood/urine test can be done to quantify the levels of exposure." She stated that his "symptoms should resolve after a time frame or removal from exposure." CX 9; RX 1.

Mr. Davenport had a gastric biopsy on December 11, 2015. CX 2. The LabCorp report noted the final diagnosis as "[c]hronic active gastritis. Immunostain for H. pylori (with control): positive." There was no dysplastic or malignant process identified. CX 2.

On October 18, 2016, Mr. Davenport had a physical at Swope Health Services. CX 1. Mr. Davenport reported ongoing gastric issues and a burning sensation in his stomach after waking and eating. He also reported some mild chest discomfort over the prior week after starting on Chantix medication. The chest pain resolved after stopping the medication. The assessment included gastroesophageal reflux disease, and chest discomfort. CX 1.

Dr. Patrick O'Toole examined Mr. Davenport on January 3, 2017, at Swope Heath Services. CX 1. Mr. Davenport complained of stomach pain and sulfuric acid exposure. Mr. Davenport reported ongoing symptoms that he believed to be related to sulfuric acid exposure. He said that at the time of the exposure his symptoms were worse. Symptoms included shortness of breath on exertion, coughing/throwing up blood, chest wall discomfort radiating around to back, irritation and burning in throat, stomach burning, and weakness. Dr. O'Toole noted that Mr. Davenport "is determined that these symptoms started as a result of the prolonged sulfuric acid…." Dr. O'Toole's assessment was shortness of breath, chest wall pain, exposure to chemical inhalation, and a history of gastritis. CX 1.

Dr. Gary Salzman wrote a letter dated March 13, 2017. In the letter he wrote:

> Mr. Davenport was exposed to fumes from a defective truck battery in May 2015 to October 2015 causing dyspnea, hemoptysis, weight loss, nausea, and near syncope. The symptoms resolved by December 2016 after he was no longer exposed. These transient symptoms were related to the exposure. These symptoms do come back periodically. Pulmonary function tests and CT chest show no significant pathology. He appears to have mild COPD from smoking 1/2 pack per

day. Currently his exercise tolerance is normal. His physical examination was normal today.

CX 13.

5. Additional Exhibits

The parties submitted other exhibits into evidence. I have carefully reviewed all exhibits submitted into evidence. A Trucking Experts settlement report, describing trucking miles appears at CX 3. A report from the Missouri Department of Labor and Industrial Relations detailing Mr. Davenport's unemployment benefits appears in CX 4. A truck service report from TA appears in CX 5. A drug test form appears in CX 6. Mr. Davenport's Department of Transportation two year certification appears in CX 7. Mr. Davenport's driver history record appears in CX 10. A transcript of a conversation between Mr. Davenport and Mr. Melson from Melson Transportation appears in CX 11. During the conversation Mr. Melson denied telling Mr. Davenport that he did not hire him because of a pre-existing ailment. Tr. 170, CX 11. Mr. Melson stated that it was because he "had a pre-existing situation, a work comp claim or something like that." Tr. 170, CX 11. "A legal matter that had to do with" LTI. Tr. 172; CX 11. Mr. Melson stated that no one from his company spoke with anyone from LTI; the information was obtained from Mr. Davenport's DAC and MVR reports. Tr. 172; CX 11. Truck Service records appear in CX 12. An email from Jessica Richter from Great West Casualty Company appears in RX 2. LTI Trucking repair service records for Mr. Davenport's assigned truck appear in JX 1.

B. DISCUSSION

As discussed above, in order to prevail on his case, Mr. Davenport must show that he engaged in protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. I find that Mr. Davenport has failed to meet his burden to prove that he suffered an adverse action.

1. Protected Activity

Mr. Davenport believed that his vehicle had some type of exhaust leak that was detrimental to his health. He complained on multiple occasions to his dispatcher about odors in his vehicle. Complaints about violations of commercial motor vehicle regulations may be oral, informal, or unofficial.[9] His complaints were directly related to the safety of his assigned vehicle. As noted above, a person may not discharge, discipline, or discriminate against an employee because they filed a complaint related to a violation of a commercial motor vehicle safety regulation.[10] I find that Mr. Davenport's reports to his dispatcher about the exhaust leak in his assigned vehicle sufficient to meet his burden to show that he engaged in protected activity.

[9] *Jackson v. CPC Logistics*, ARB No. 07-006 (Oct. 31, 2008, *citing Calhoun v. United Parcel Service*, ARB No. 04-008 (Sept. 14, 2007).
[10] *See* 49 U.S.C. §§ 31105(a)(1), (A)(i).

2. **Adverse Action**

Mr. Wilson, LTI's Directory of Safety, testified that Mr. Davenport's medical provider informed LTI that he was not cleared to return to work due to his illness. Tr. 237. He stated this was consistent with what Mr. Davenport had already told LTI. Tr. 237. He said that LTI's policy, when a driver has an illness that prevents them from operating a vehicle for more than a short period of time, is to send the driver home. Tr. 238. He said that the driver is permitted to return after being cleared by a medical provider and having a physical. Tr. 238. Mr. Wilson testified that he was sending Mr. Davenport home until he was cleared to return to work. Tr. 238. He did not know how long Mr. Davenport would be unable to drive. Tr. 238.

Mr. Davenport testified that his medical provider refused to allow him to return to work. Tr. 189. He further testified that his medical provider informed him that he would need his primary care physician to clear him to return to work. Tr. 189. He testified that he informed the Respondent that he was unable to work due to his illness. Tr. 191. Mr. Davenport testified that LTI fired him. Tr. 192. He agreed that Mr. Wilson informed him that he could return after he was better. Tr. 193. Mr. Davenport believed that Mr. Wilson was insincere in his offer to allow him to return after being cleared by his primary care physician and that he was, in actuality, being fired. *See* Tr. 193.

Based on the testimony at hearing it is evident that the Mr. Davenport's medical provider determined that he could not operate his vehicle. Further, it is undisputed that LTI was aware that he was not medically cleared to drive. I credit Mr. Wilson's testimony that LTI's policy is to not permit an employee to operate a motor vehicle when a medical provider has refused to clear them to do so. Anything less would be irresponsible. I credit Mr. Wilson's testimony that LTI has a policy of sending home employees who are unable to drive for long or indefinite periods of time. Based on the testimony of both Mr. Wilson and Mr. Davenport, I find that LTI did not fire Mr. Davenport, but was instead sending him home until such time as he obtained medical clearance to drive. I give no weight to Mr. Davenport's opinion that when Mr. Wilson informed him that he could return he was really firing him. Under the circumstances, LTI had no choice but to restrict Mr. Davenport from operating a company vehicle. To do otherwise would have been unsafe. I find that LTI did not fire Mr. Davenport. Additionally, I find that the act of sending Mr. Davenport home was not an adverse action under the circumstances. Therefore, I find that Mr. Davenport has failed to meet his burden to show an adverse action.

3. **Adverse Action Regardless of Protected Activity**

Even assuming *arguendo* that LTI did take an adverse action against Mr. Davenport by terminating his employment, I find that it would have done so regardless of the protected activity.

An email from Jessica Richter reported that Mr. Davenport wrote that he "[u]nderstand[s] a lot more why people get AK-47s and go off." Tr. 242. Mr. Wilson testified that this statement concerned him. Tr. 242. Based on this statement LTI made the decision to not permit Mr. Davenport to return to work in the event he obtained medical clearance to do so. Tr. 243.

When I asked Mr. Davenport if he made the statement about an AK-47, he did not deny having made the statement. He said:

> Ma'am, I stated – what I stated is that I see why people – I didn't say what I was. I didn't – I didn't make no direct threat to anyone. I'm not – don't have no violence whatsoever. I mean, I think that they view me as a threat due to the fact that I have filed these complaints, and to waive liability, they wanted to bring up anything that they could to make me look like I am the villain.

Tr. 276.

I credit Mr. Wilson's testimony that this statement, standing alone, was sufficient for LTI to make the determination that Mr. Davenport should not be permitted to return to work. Therefore, I find that LTI could meet its burden to show by clear and convincing evidence that it would have terminated Mr. Davenport's employment regardless of any protected activity he engaged in.

C. CONCLUSION

For the reasons discussed above, I find that the Complainant has failed to prove his case under the STAA.

V. ORDER

The Complainant has failed to meet his burden to prove that he suffered any adverse action during his employment with the Respondent. The Complainant's claim filed with OSHA on October 16, 2015, is **DENIED.**

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 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 email 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).