U.S. Department of Labor

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Issue Date: 08 October 2019

CASE NO.: 2018-STA-00083

IN THE MATTER OF

RONALD JACKSON
Complainant
v.

DOUBLEBACK TRANSPORTATION, LLC
Respondent

APPEARANCES:

For the Claimant: Ronald Jackson (self-represented)

For the Employer/Carrier: Matt Drinkard, Esq.

BEFORE: ANGELA F. DONALDSON
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the "STAA" or "the Act") and the regulations promulgated thereunder at 29 C.F.R. Part 1978 and 20 C.F.R. Part 24. Complainant Mr. Jackson filed a formal complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") on August 23, 2017, alleging that Respondent Doubleback Transportation, LLC, ("Doubleback" or "Employer") discriminated against him for protected activity under the Act. Mr. Jackson alleged he was terminated on or about May 26, 2017 (by letter dated May 24, 2017), in retaliation for raising concerns about truck no. 57 on May 22, 2017. The Regional Administrator for OSHA issued findings on the complaint on behalf of the Secretary of Labor on August 29, 2018, concluding that there was no reasonable cause to believe Respondent violated the Act. Mr. Jackson thereafter timely requested a hearing.

I conducted a formal hearing in Mobile, Alabama, on March 13, 2019, at which time the parties were afforded full opportunity to present evidence and argument. Mr. Jackson was self-represented at the hearing. Respondent was represented by Matt Drinkard, Esq. Mr. Jackson testified at the hearing, as well as Mr. Jackson's witness Ronald Jackson, Jr. Doubleback's witness at the hearing was its General Manager, Becky Pilkington.

At the hearing, the following exhibits were admitted for Mr. Jackson: Complainant's Exhibits ("CX") 4, 8, 9, 10 (pp. 1-4, 8-12), 11, 12, 13, 14 (pages 1-2, 4), and 15.[1] Respondent's Exhibits ("RX") 1-6, and 10-15 were also admitted. Complainant's post-hearing submission of a video on DVD as an additional exhibit (CX-16), which is admitted in part, is addressed in more detail below. The record was not closed until receipt of Complainant's post-hearing evidence on June 13, 2019.

Consistent with the filing deadlines ordered by the undersigned, Mr. Jackson and counsel for Doubleback filed post-hearing briefs. The findings of fact and conclusions of law that follow are based on a complete review of the entire record, the arguments of the parties, and applicable statutes, regulations and precedent. The claim arises out of the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit.

I. THE PARTIES' POSITIONS

Mr. Jackson argues that he was terminated for raising safety concerns regarding Respondent's trucks. He makes some broad allegations as to problems with trucks generally, stating that one truck had a defect with its tailgate, that "trucks are in poor condition" generally, and that Respondent tolerated "shoddy maintenance." As far as any specific complaints regarding his operation of Respondent's trucks, Mr. Jackson identifies his report of April 30, 2017, about truck no. 57, and complaints he raised on May 22, 2017, about the same truck. (Complainant's Post-Hearing Brief, pp. 2-5).

Mr. Jackson asserts that Respondent's attitude toward him changed for the worse after Ms. Pilkington became General Manager. He also contends that a written reprimand preceding his termination was for "three unrelated issues" during his probationary period. (Complainant's Post-Hearing Brief, pp. 2, 4).

Mr. Jackson argues that his refusal to drive the truck on May 22, 2017, was based solely on his "concerns of safety of the truck." Mr. Jackson notes that because of his concerns he returned the truck to the Employer's shop that day. He contends that he never walked off the job when he left the workplace on May 22, 2017, but was merely waiting for a communication from the Employer about the condition of the truck before resuming truck driving that day. (Complainant's Post-Hearing Brief, pp. 3-6).

Mr. Jackson challenges evidence presented by the Respondent including a log sheet from May 22, 2017, showing that one of Respondent's employees, Heath Moore, successfully hauled a load with truck no. 57, which was the same truck that Mr. Jackson reported was not safe and refused to drive shortly before Mr. Jackson was terminated. Mr. Jackson submits that the log sheet signed by Mr. Moore contained errors in how the driver documented his start and end locations of the trip, and thus is a "falsified document." (Complainant's Post-Hearing Brief).

[1] The parties were instructed to attach their hearing exhibits to their post-hearing briefs. Complainant submitted his exhibits with this brief; however, they were renumbered and presented in a different order than the exhibits he submitted at the hearing. Therefore, Complainant was ordered to correct his exhibits by submitting them in the exact same manner that they were submitted and admitted at the hearing. This Decision and Order refers only to the exhibits as they were marked and identified when admitted at the hearing.

Mr. Jackson seeks compensatory damages, back pay with interest, special damages, punitive damages and fees. He states he made $70,000.00 per year. (Id., p. 6; TR at 166-67).

Respondent contends in its brief that Mr. Jackson was terminated for cause and not in retaliation for raising safety concerns with truck no. 57. Respondent submits that the evidence reflects progressive discipline of Mr. Jackson from verbal reprimands to a written reprimand for job performance issues, after which Respondent contends Mr. Jackson's demeanor changed for the worse, and he was ultimately terminated for walking off the job and refusing to haul his scheduled load. Respondent argues that the Act prohibits the discharge of an employee who has refused to operate a vehicle because it violates a regulation, standard or order of the United States pertaining to commercial motor vehicle safety, health or security, and that, here, the evidence reflects that Respondent addressed any safety concerns that Mr. Jackson raised but he thereafter refused to perform a lawful job request. Respondent submits that the same truck (no. 57) was then operated by a different employee without incident and without report of any safety-related operational defect. (Respondent's Post-Hearing Brief).

II. CONTESTED ISSUES

Whether Respondent violated the STAA when it terminated Mr. Jackson's employment and, if so, what remedies should be awarded.

III. RELEVANT EVIDENCE CONSIDERED

A. Stipulations

At the hearing, the parties agreed that the Surface Transportation Assistance Act of 1982 applies to this claim, that the Complainant is an "employee" and Respondent is a "person" under the Act, and that the undersigned has jurisdiction over the proceeding. The parties further agreed that Mr. Jackson was employed by Doubleback from January 4 or 5, 2017 until May 24, 2017. (TR at 52-55).

B. Post-hearing evidence

At the conclusion of the formal hearing, Complainant was provided opportunity to submit post-hearing video evidence, which was referenced during testimony, of a conversation purportedly held between him and Ms. Pilkington and others at the worksite on May 22, 2017, in connection with Mr. Jackson's report of safety concerns about truck no. 57. (TR at 144-45, 273). Respondent stated it would not object to the admission of such evidence if it solely concerned video from the Employer's shop on May 22, 2017, which was the same video Respondent was aware was given by Mr. Jackson to the OSHA investigator prior to the issuance of the Secretary of Labor's findings. (TR at 274).

Mr. Jackson submitted a DVD with video and he attached a written description of the DVD's contents. The DVD contains the following four videos: a video 1 minute and 3 seconds long about a tailgate on truck no. 11/103 that would not close; a video 14 minutes and 3 seconds long depicting a conversation held over CB radio between Mr. Jackson and a co-worker about

Ms. Pilkington's interactions with certain drivers; a video 18 minutes and 22 seconds long containing a similar conversation between Mr. Jackson and co-workers "about different issues on the job" including how some drivers were never written up and other issues about "shoddy maintenance" and inadequate mechanics; and lastly, a video 12 minutes and 31 seconds long, which contains the video referenced during testimony at the hearing. The video, which Mr. Jackson states was taken from his phone in his front shirt pocket, reflects conversations he held with individuals at Respondent's worksite on May 22, 2017, about Mr. Jackson's concerns about truck no. 57. Mr. Jackson submits that this video shows that he asked to be called when the truck was ready to be driven and he did not walk off the job. (Complainant's attachment to DVD received June 13, 2019; Complainant's Post-Hearing Brief, p. 3).

Respondent objects to the admission of the DVD to the extent it contains any and all videos not taken or recorded on May 22, 2017, as they are not material or relevant to the issues to be resolved. Respondent "does not object to the admission of the audio recording on May 22, 2017, that is referenced in the Secretary's findings dated August 29, 2018" and that Mr. Jackson bears the burden of authenticating that the recording he submitted and the one referenced in the Secretary's findings are the same.

Mr. Jackson's post-hearing DVD is accepted and admitted as CX-16. However, I grant the admission of the exhibit only for the portion (12 minutes and 31 seconds long) containing a video record of events that are consistent with the parties' description of events that happened on May 22, 2017, the last day that Mr. Jackson was at the worksite. I agree with Respondent that the other portions do not contain material or relevant evidence and thus all but the 12-minute, 31-second record of events on May 22, 2017, are excluded. This comports with my discussion with the parties at the hearing about the scope of evidence submitted post-hearing. (TR at 144-45, 273-75).

C. Testimonial evidence and witness credibility determinations

The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh evidence, and to draw her own inferences and conclusions from the evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968) (part of witness's testimony may be accepted without accepting it all); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981) ("It is fundamental that credibility determinations and the resolution of conflicting evidence are the prerogative of the fact finder, here the ALJ."). *See also McDaniel v. Boyd Brothers Transportation*, 86-STA-6 (Sec'y Mar. 16, 1987) (upholding credibility determinations of ALJ who accepted testimony of respondent's witnesses as more plausible than complainant's when resolving question of whether complainant quit or was fired).

An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991).

In weighing testimony in this matter, the undersigned considered the extent to which the testimony of each witness was supported or contradicted by other relevant, credible evidence, the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the matter at issue. *See Louis v. Blackburn,* 630 F.2d 1105, 1105 (5th Cir. 1980); *United States v. Whitaker*, 2017 U.S. Dist. LEXIS 84894 (M.D. La. 2017) ("In weighing credibility determinations, courts weigh factors such as inconsistencies, intentional omissions, and even demeanor of the witnesses in order to determine if the witness's testimony is credible.") (citations omitted).

1) Complainant Ronald Jackson

Mr. Jackson was convicted of prior felonies in the State of Alabama for unlawful possession of a controlled substance in April 2001; credit card possession / fraud in December 2001; and theft of property in June 2013. (TR at 12RX-15). The fraud and theft convictions involve crimes of moral turpitude in Alabama. Code of Alabama Section 13A-8-3; *Balogun v. Ashcroft*, 270 F.3d 274, 279-80 (5th Cir. 2001). However, only one of the convictions (theft of property) occurred in the last 10 years.[2] Mr. Jackson's sentence of 15 years for that conviction was reduced to 2 years in custody and 5 years of supervised probation. (RX-15). Thus, Mr. Jackson's credibility is impeachable by virtue of his June 2013 conviction. *See* Fed. R. Civ. P. 609; 29 C.F.R. 18.609(a), (b).

Mr. Jackson was asked whether he received the June 2013 conviction; he responded that this is the "first time [] seeing this, I don't know. I don't have a copy of this. I have this, yes I do. But I don't – this is my first time seeing these notices that you have before me." (TR at 132). I have noted the impeachment of Mr. Jackson's credibility due to the June 2013 felony conviction, without having additional context or background information from Mr. Jackson regarding the circumstances of the conviction, despite his opportunity at the hearing to provide same. Notwithstanding his June 2013 conviction, I have primarily considered whether Mr. Jackson's testimony in this proceeding was inherently reliable and credible due to its plausibility and consistency both internally and with other evidence of record.

Having observed Mr. Jackson's demeanor, he presented as sincere and cooperative, but was not a good historian and did not present evidence of complaints or protected activity, or Respondent's responses to same, with clarity or precision. Though his testimony was frequently hard to follow, his recitation of events was often more disorganized than evasive, and I attribute the lack of organization to his self-representation and lack of familiarity with the applicable procedures. That said, I have addressed below certain conflicts in the evidence and how such conflicts were resolved in favor of either Complainant or Respondent.

[2] Because more than 10 years have passed since the 2001 convictions, the evidence is admissible only if the probative value outweighs its prejudicial effect, and the proponent has given the adverse party "reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use." Fed. R. Civ. P. 609(b). Because these conditions have not been met here, particularly as to notice to Mr. Jackson of Respondent's intent to use the 2001 convictions, the evidence is not admissible, and I have not considered it in reaching any conclusions herein. Having admitted the entirety of RX-15 at hearing, which includes the admissible 2013 conviction, I find herein that no weight at all should be given to the evidence of the 2001 convictions.

Mr. Jackson testified at the hearing that on or about April 30, 2017, he made certain complaints about the "slack adjusters" on truck no. 57, and that the tailgate was not closing properly, the truck was not stopping properly, and there were problems with the air conditioner and leaf spring bolts. He testified that he wrote the problems on a sticky note because he felt he could not write them on a Driver's Vehicle Inspection Report (DVIR) and he put the note on the mechanic's desk. (TR at 97-98, 155). However, there is a written DVIR form that Mr. Jackson signed and dated April 30, 2017, showing that Mr. Jackson checked that the vehicle condition was satisfactory and that he also made a note to "check brake callibur [sic] something pop, steering right front tire." (CX-14, p. 1). The Employer acknowledged receipt of the DVIR with these notes. I have credited Mr. Jackson's testimony about his reports of April 30, 2017, only to the extent that his testimony is consistent with the DVIR that he personally completed and signed on that date. Even though complaints of safety matters may be oral rather than written for purposes under the Act, Mr. Jackson's testimony referenced additional safety issues or concerns that were not recorded on the DVIR that he had completed at or very close in time to the events in question. Moreover, Mr. Jackson testified that he wrote concerns on a sticky note because he felt he could not include them on the DVIR; it is not disputed, however, that his concerns were in fact noted on the DVIR that day. (CX-14, p. 1). It is also not disputed that a safety meeting had not yet occurred as of April 30, 2017, during which Mr. Jackson states drivers were encouraged not to report concerns on DVIRs, but rather to write them on sticky notes or report them verbally. As such, Mr. Jackson's testimony regarding the scope and method of concerns he raised on April 30, 2017, are only partially supported by other documentary and testimonial evidence, and thus I have given more weight to reports he made in writing on April 30, 2017, than his inconsistent recollection of the events at a later date.

Concerning a conflict in testimony between Mr. Jackson and Respondent's General Manager Becky Pilkington over whether Mr. Jackson was told during a May 3, 2017 safety meeting not to write down operational problems with trucks on vehicle inspection reports, I have credited Mr. Jackson's testimony as reliable even though it was contradicted by Ms. Pilkington's testimony and the written agenda for the safety meeting where this topic arose. I credited Mr. Jackson's testimony because it was consistent with the testimony of Ronald Jackson, Jr., who testified he witnessed the instruction when it was given. Even so, I find that the incident has limited relevance to the issues to be resolved.

However, I have not credited the testimony of Mr. Jackson that on his last day at the Doubleback worksite on May 22, 2017, he never refused to drive his truck even though repairs were performed and his concerns addressed. His testimony lacked plausibility that he left the worksite while truck repairs were being done, had lunch, waited for a text "all day" that his truck was ready, returned to the worksite at 3:00 p.m. and saw that his truck was still there and just assumed it had not been repaired and so went home. (TR at 110-12). According to Mr. Jackson, he said before leaving the worksite, so that "everyone knew," to "call me to continue my load." (TR at 110).

In contrast, Ms. Pilkington credibly testified that Mr. Jackson continued to complain about the truck even after repairs were undertaken on May 22nd and he expressly refused to haul the load with the truck that day. Employer's records show that a different employee starting hauling that load around 2:15 p.m. the same day and successfully completed the haul later that

day. (RX-4). Mr. Jackson's version of the daily log and DVIR for May 22, 2017, which Ms. Pilkington denied receiving, indicates that Mr. Jackson started working with a pre-trip inspection around 11:15 a.m., was "waiting on truck repairs" starting around 3:30 p.m., and that he continued to be on duty waiting for repairs until 8:00 p.m. that night. (CX-14, p. 2). As such, the timeline proposed by Mr. Jackson in his hearing testimony is not at all consistent with his own written record of the events of May 22nd or with the Employer's records. Also, his explanation of not refusing to drive the truck but rather waiting off site and then returning around 3:00 p.m. and deciding to simply go home, without actually discussing or verifying the condition of the truck with anyone, is not plausible.

Further, the DVD submitted by Mr. Jackson is more supportive of Ms. Pilkington's testimony than Mr. Jackson's testimony. (CX-16[3]). The video initially comports with Mr. Jackson's testimony that he brought to the truck to Respondent's shop and complained it was shaking, that it was a safety issue, and stated that he could not drive the truck in that condition. (Id. at :13 minutes and 1:45 minutes). Mr. Jackson also mentioned the cruise control wasn't working. (Id. at :50 minutes). A male individual whose face is not visible to the camera states "could be the tires." (Id. at 2:10 minutes). Mr. Jackson is heard stating that there was also a problem with hot air in the truck (there is noise obscuring some of the comments at this point). (Id. at 2:35 minutes). When the other male individual states, "I can change this tire," Mr. Jackson responds that it does not matter, because he was not going to drive the truck because it was not safe. (Id. at 3:00-3:05 minutes). Mr. Jackson repeats at times throughout the remainder of the video that the truck "is not safe to me" or "unsafe for me." (Id. at 3:00-3:05, 9:48-9:58 minutes, 10:25-10:34 minutes). At about 4:05 minutes into the video, Mr. Jackson states that he is not going to drive the truck, before changing of the tire is accomplished.

At 6:12 minutes, after further discussion about changing the tire, a female voice states that Brent [Fuller, presumably] was going to drive the truck down the road before giving the truck back to Mr. Jackson. Mr. Jackson states Mr. Fuller can go ahead and check the cruise control while he is at it. (Id. at 6:17-6:24 minutes). There is a discussion at this point about whether functioning cruise control is required, and Mr. Jackson asserts that it is and that the others can go "look at the DOT book." (Id. at 6:28-7:00 minutes). Around 7:25-7:43 minutes, Mr. Jackson discusses the heater issue with the truck again and asks that it be fixed "before I leave here." A few minutes later, Mr. Jackson suddenly asks several times whether he is about to be fired. (Id. at 7:50-8:12 minutes). A male voice explains he was not talking about firing Mr. Jackson, he was talking about preventing the truck from catching fire; he asked Mr. Jackson to "clean your ears out." (Id.). When Mr. Jackson repeats around 9:58 minutes that he is not going to drive the truck because it is "unsafe for me," a voice tells him that "we'll get somebody else to drive it," and Mr. Jackson states, "then get somebody else." (Id. at 10:00 minutes).

At 10:10 minutes, there is more talk about putting a tire on the truck, Mr. Jackson again says it is not safe and is asked what makes it unsafe. Mr. Jackson says "the whole thing, the

[3] There is no date or time stamp on the video. As noted herein, Respondent did not object to the admission of this particular video. Alabama law permits any device to record communications with the consent of at least one person taking part in the communication. Ala. Code § 13A-11-30. Mr. Jackson did not explain the method of obtaining the recording marked CX-16. However, the contents of the video reflect that Mr. Jackson is always a party to conversations being recorded and indicates Mr. Jackson was aware of, and consented to, this recording.

heating, the electrical problem" and mentions a mirror. Mr. Jackson states at this points he needs things to make him "feel safe" as a driver, and if he "feels like" the truck "is not up to par, it's not up to par." (Id. at 10:25-10:34 minutes). When Mr. Jackson disagrees that shaking can be a tire problem, the other male voice states that tires are the first thing to check when there is shaking. (Id. at 10:40-11:03 minutes). Mr. Jackson says, "let me know when you get it fixed, holler at me." (Id. at 11:03-11:04). Mr. Jackson then proceeds to an office where he asks for the "General Manager" and is told she is on the phone. (Id. at 11:32 minutes). He then asks for the owner's number and states, "Let me know when I can get his number. I'm not gonna drive that truck [sic]." (Id. at 11:32-11:46 minutes). At the conclusion of the video, at 12:25 to 12:28 minutes, Mr. Jackson leaves the office and appears to get into a private vehicle stating he is not going to drive a "tore up" truck.

Having reviewed the contents of the 12-minute, 31-second video, which appears to document many of the events described by Mr. Jackson and Ms. Pilkington that occurred on May 22, 2017, I find that more weight should be given to Ms. Pilkington's depiction of events on that day because the video is more consistent with her testimony. The recorded conversations reflect Mr. Jackson's initial complaints and the suggestion by Respondent's employees to change a tire to address the shaking and that they will also address the problem of heat in the truck. There is also a discussion that functioning cruise control is not a requirement. Mr. Jackson's video does not depict any activities after the Respondent's complete their fixes to the truck. Although Mr. Jackson states briefly at one point to "let me know when you get it fixed, holler at me," throughout the rest of the video, before and after this comment, he clearly refuses to drive the truck several times, no matter what Respondent's employees state they will do to address his concerns. The video does not reflect any statement by Mr. Jackson that he will be standing by, waiting for a message or text that the truck is ready, in order to haul the scheduled load that day. In fact, at one point, Mr. Jackson states Respondent can go ahead and get another driver for that truck. Mr. Jackson states at least six times during the video that he is not going to drive the truck, regardless of what actions Respondent's employees take. His very last statement on the video is that he refuses to drive the truck, not that he is leaving to wait for word that the truck is ready for him to drive. For all of these reasons, I do not find Mr. Jackson's testimony credible that he was merely waiting for word that the truck was ready, rather than walking off after categorically refusing to drive the truck.

Mr. Jackson also submitted into evidence a different copy of the May 22, 2017, driver's daily log and DVIR which contained Mr. Jackson's own handwritten notes about the events of that day and included several more safety complaints than hearing testimony indicated were made by Mr. Jackson verbally that day. (CX-14, p. 2; TR at 45). Mr. Jackson's DVIR indicates he did a pre-trip inspection around 11:15 a.m. in Jackson, Alabama and drove for .75 of an hour (or 45 minutes) until at noon he began "waiting on truck repairs" until off-duty at 8:00 p.m. Mr. Jackson's DVIR noted several problems with the truck's tires/wheels/rims, leaks, tail lights, air pressure warning device, low oil pressure, and other problems handwritten in the bottom right corner including steering pulls to the right side, front end shaking badly, no cruise control, brakes, bad rims, leads on dump bucket (hydraulics), losing more air than supposed to, window knob missing, fire extinguisher not properly placed in cab of truck, and a problem with the gears. Mr. Jackson also checked the box for the condition of the vehicle being "satisfactory." Ms. Pilkington denied seeing Mr. Jackson's version of the DVIR prior to the hearing. Mr. Jackson

initially testified that he presented his DVIR to Ms. Pilkington and she refused to take it from him and then he later stated that he gave the DVIR to Mr. Bolen, so he asked Ms. Pilkington to explain why Mr. Bolen had not passed the log and DVIR along to her. (TR at 151-52, 267-70). Therefore, Mr. Jackson did not provide internally consistent testimony about his purported submission of this DVIR. Having considered the demeanor of the witnesses and the consistencies or inconsistencies of their testimony, I have given no weight to Mr. Jackson's testimony that he provided to the Employer the May 22, 2017, log and DVIR with his written concerns. Rather, the evidence reflects that Mr. Jackson verbally reported the truck shaking, hot air entering the cab, and a problem with the cruise control.

2) Ronald Jackson, Jr.

Ronald Jackson, Jr., testified regarding certain limited matters he personally observed at the workplace, where he also worked. Ronald Jackson, Jr., started working at Doubleback after his father and stopped working there around the same time his father did. I have credited Ronald Jackson, Jr.'s testimony regarding the general condition of trucks that he personally observed, due to his role as a detailer who would be in a position to observe such things. However, Ronald Jackson, Jr., did not provide any specific observations concerning his father's operation of trucks on April 30, 2017 or May 22, 2017. I have also credited his testimony that he witnessed his father being given instructions to avoid reporting truck defects in writing on vehicle inspection reports because it was largely consistent with Complainant's testimony as noted above.

3) Becky Pilkington

Ms. Pilkington's testimony reflected a good recall of the general timeline of Mr. Jackson's employment and her bases for issuing progressive discipline resulting ultimately in Mr. Jackson's termination. She testified calmly, attempted to answer only the questions asked, and had fairly good recall of dates important to Mr. Jackson's employment, including any complaints he made regarding the safe operation of trucks and the reasons for any adverse actions taken against Mr. Jackson. As noted above, I have also credited testimony of Ms. Pilkington when consistent with Respondent's records and other evidence, and when more plausible than the testimony of Mr. Jackson.

D. Relevant and Material Findings of Fact

Based on the parties' stipulations, documentary exhibits, and testimonial evidence presented, the undersigned makes the following relevant and material findings of fact in this case:

1. At the time of the hearing, Complainant Mr. Jackson was 51 years old and had about 30 years of work experience as a truck driver. He has a commercial driver's license and mainly worked hauling over-the-road. (TR at 81-83).

2. Mr. Jackson began working as a truck driver for Doubleback in early January 2017. He drove trailers, which he called "buckets," that picked up and dumped materials. His routes were within the State of Alabama. (TR at 82-84, 161-62).

3. Doubleback employed about 30-35 full-time employees in early 2017, and a few part-time, "as needed," drivers such as Mr. Jackson. A part-time employee may at times work a 40-hour work week. (TR at 255-56).

4. Becky Pilkington was employed as of February 2017 by Doubleback. She became General Manager on or about March 20, 2017. (TR at 90, 189).

5. Daron Bolen[4] was Safety Manager/Shop Manager for Doubleback in early 2017. Mr. Bolen had been the General Manager until Ms. Pilkington was placed in that position. (TR at 90, 189, 192).

6. Brent Fuller and Jerry Gates were Mechanics for Doubleback when Mr. Jackson worked there. (TR at 99, 101-02).

7. Although he started with a "slow" schedule, Mr. Jackson soon began working 40 hours per week or more and tended to work evening shifts. (TR at 84).

8. Drivers were required to complete a daily log and a Driver's Vehicle Inspection Report (DVIR). The daily log shows such information as the date, the total daily mileage, the truck and trailer numbers, the hours at which the driver was off duty, in the sleeper berth, driving, and on duty but not driving, and the commodity being hauled. Under "remarks," there was a place for drivers to write their geographical location when doing a pre-trip inspection ("PTI"), driving, taking breaks, unloading, and when off duty. The daily log also indicates the locations where the driver starts driving from, travels to, and returns to at the end of the haul. The DVIR shows the truck and trailer numbers, places to report whether parts of the tractor/truck or trailer are defective, a box to check for "condition of the above vehicle is satisfactory," signature line for driver and date, and odometer start and end readings with total miles driven. The driver may note operational defects on the DVIR either pre- or post-trip. (TR at 157-61, 215; CX-8).

9. Becky Pilkington approached Mr. Jackson with a written reprimand dated April 19, 2017, describing three incidents that occurred on April 11, 13, and 14, 2017. Ms. Pilkington discussed the incidents with Mr. Jackson as they occurred and then, because she received three complaints about Mr. Jackson in four days, she included them in a written reprimand titled "Disciplinary Action" dated April 19th. (TR at 85, RX-5).

10. According to the written reprimand, the first incident on April 11th, concerned Truck 11/Trailer 103 pulling into the shop for maintenance with the tailgate left open; Mr. Jackson had last driven the truck and told Ms. Pilkington "he probably did leave it open." The second incident occurred on April 13th, when Mr. Jackson was scheduled to pick up a load with Truck 45/Trailer 111. He arrived at the warehouse to pick up the load and only then realized he had the wrong trailer so he returned to the shop to

[4] The Transcript refers to this individual as Darin Bowling. However RX-2 identifies the spelling as Daron Bolen.

switch trailers. Regarding the third incident, on April 14th, Ms. Pilkington received an anonymous call from a "concerned citizen," who reported Truck 39 between Jackson and McIntosh was "speeding, weaving through traffic and cut a person off." Because Mr. Jackson was noted to be driving Truck 39 at the time, Ms. Pilkington "called him and asked him to slow down and drive safely." The written reprimand advised, "Any further incidents that would require any disciplinary action against Ronald Jackson will result in suspension of employment." Mr. Jackson denied that the events in the reprimand had occurred and was noted to refuse to sign the written reprimand on April 20, 2017. Ms. Pilkington and a witness signed the reprimand on April 20, 2017. Ms. Pilkington "scratched through," or struck through, the second offense that occurred on April 13, 2017; she accepted Mr. Jackson's explanation that he ascertained on his own that he had the wrong trailer and having caught the mistake, he turned around to correct the problem. (RX-5; TR at 85, 205-11, 233-36).

11. Verbal reprimands had occurred before the written reprimand and after Ms. Pilkington became General Manager on March 20th; Ms. Pilkington did not recall the dates. One verbal reprimand concerning speeding. (TR at 236-37, 258).

12. Mr. Jackson did not receive any change in pay, benefits, work conditions, or scheduling as a result of the reprimand. He believed Ms. Pilkington's attitude toward him changed. Ms. Pilkington, in turn, believed that she observed a change in Mr. Jackson's demeanor after the written reprimand. She believed he went from a "happy, playful, carefree truck driver" to "very hostile." (TR at 121-22, 211).

13. According to Ronald Jackson, Jr., Complainant's son who also worked for Doubleback detailing trucks and trailers in April 2017, Complainant was told in connection with a reprimand not to worry about it, because it was "nothing big." However, after receiving an initial reprimand, it was soon followed by "three reprimands at one time." (TR at 169-70, 172, 179).

14. On April 30, 2017, Mr. Jackson completed a DVIR for that day which noted that the vehicle condition was satisfactory; no defective items were checked. Mr. Jackson also made a note to "check brake callibur [sic] something pop, steering right front tire." On that day, Mr. Jackson drove from Jackson to Calera and Calvert, Alabama and returned to Jackson for a total of 383 miles. He was able to load in Calera and unload in Calvert. Mr. Jackson signed and dated the DVIR. According to Ms. Pilkington, the shop manager addressed the concerns Mr. Jackson reported that day. Mr. Jackson drove truck no. 57 again on May 19, 20, and 21, 2017, without incident or report of concerns. (TR at 97-98, 155, 213-14; RX-3; CX-14, p. 1).

15. On or about May 3, 2017, Mr. Jackson was in a "Driver Safety Meeting" where Ms. Pilkington was providing safety training. The May 3, 2017, meeting agenda was written and distributed; it was signed by Mr. Jackson. The agenda contains item no. 2 "DVIR, Notify Shop Manager of any issues written up on DVIR. (In Person, Text, Written notification left on Managers [sic] desk.)." Mr. Jackson interpreted item no. 2 to communicate that drivers were to avoid writing problems on DVIRs because they

were encouraged to submit them separately "in person, text" or by a note left on the manager's desk. During the meeting, Mr. Jackson also heard Ms. Pilkington give verbal instructions on information not to include in a DVIR, including problems with a truck, because it "makes the company look bad." Ronald Jackson, Jr., was present when his father was told not to write problems with his trucks in his logbook, but rather to verbally report the problems or write them on a stick note. (RX-14; TR at 90-91, 93-94, 96, 98, 135-36, 154, 176-77, 179-80).

16. On May 19, 20, 21, and 22, 2017, Mr. Jackson drove truck no. 57. The Employer's records of Mr. Jackson's driving on those dates is reflected in his daily log and the DVIR. (RX-3; TR at 157-61).

17. On May 19, 2017, the records reflect that Mr. Jackson drove truck no. 57 to haul lime from Jackson to Calera to Calvert, Alabama and return travel to Jackson for a total of 381 miles. He had a total of 14 off- duty hours, 8 driving hours, and 2 on-duty hours. He indicated the condition of the vehicle was satisfactory. On May 20, 2017, Mr. Jackson drover the same truck on the same route and had similar off-duty, driving, and on-duty hours. He did not indicate any unsatisfactory or defective conditions with the truck. On May 21, 2017, Mr. Jackson drove from Jackson to Calera, Alabama, with total mileage of 381. His hours were again similar, and he did not indicate any problems with the vehicle. Mr. Jackson signed and dated these DVIRs. (RX-3; TR at 140-41).

18. On or about May 22, 2017, Mr. Jackson began driving truck no. 57 that day and noticed that it was "shaking." He stopped at Dunn's Truck Stop in Grove Hill, Alabama, and called Doubleback's mechanic Mr. Fuller, who suggested that there may be a problem with a tire. So, Mr. Jackson turned around to bring the truck back to the Employer's shop. Dunn's is about 10 to 11 miles from the Employer's location. Before leaving Dunn's and returning to the Employer's shop, Mr. Jackson began writing down on the DVIR for the day the problems he had with truck no. 57. (TR at 101-03, 107-09).

19. Ms. Pilkington first became aware on May 22, 2017, that Mr. Jackson had concerns about the truck he was driving, when he reported it was shaking. Mr. Jackson returned to the shop and was "shouting he cannot drive this truck" because "it is not safe." When Ms. Pilkington asked him to show her the problems on the truck, Mr. Jackson refused and stated he would only deal with Mr. Bolen, the shop manager. (TR at 191-94, 254).

20. Ms. Pilkington asked Mr. Fuller to inspect the truck for the cause of the shaking and to specifically look at the front end. Mr. Fuller found wear on the passenger-side tire, so Ms. Pilkington instructed the worn tire be replaced with a virgin tire. According to Mr. Jackson, Doubleback responded to his concerns about truck no. 57 by putting a new tire on it. Ms. Pilkington confirmed a new tire was installed. (TR at 110, 194-95).

21. Mr. Bolen and Mr. Fuller drove the truck about 10 miles up the road and back (20 miles roundtrip) after the tire was replaced. They did not report any shaking to Ms. Pilkington. (TR at 197).

22. Mr. Jackson also complained about "hot air in the cab," and Ms. Pilkington learned that the heater hose sometimes recirculated hot air. Since it was May, and the heater was no longer needed, she asked for the heater hose to be disconnected in Mr. Jackson's truck. (TR at 196, 232).

23. Mr. Jackson also reported a cruise control problem on May 22, 2017, and Ms. Pilkington determined through discussions with Mr. Bolen that a working cruise control was not a Department of Transportation requirement that prevented safe operation of the truck. At this point, Ms. Pilkington considered the truck to be operational and expected Mr. Jackson to haul his scheduled load with truck no. 57. Mr. Jackson expressly refused to do so, so a different employee, Heath Moore, hauled the load with truck no. 57 that day. (TR at 103, 105-06, 197-98, 203, 259-60).

24. On May 22, 2017, a driver's daily log and DVIR show that Heath Moore drove from and returned to Jackson, Alabama, to haul lime for total mileage of 383 miles. Mr. Moore started driving at 2:15 p.m. The remarks show loading in Calera, Alabama, at 6:00 p.m. and unloading in Calvert at 10:15p.m. Mr. Moore had 15.25 off-duty hours, 6.5 driving hours, and 2.25 on-duty hours. He returned to Jackson and marked himself off-duty at 11:15 p.m. Mr. Moore checked the box that the condition of the truck was satisfactory, and he signed and dated the form. I find no evidence Mr. Moore's log and DVIR were falsified. The entries are generally consistent with the entries Mr. Jackson made in his daily logs and DVIRs. (RX-4; TR at 142-43, 221).

25. According to Ms. Pilkington, Mr. Moore did not report any operational defects with truck no. 57, and he successfully completed hauling the load on May 22, 2017. (TR at 198-99).

26. On or about May 23, 2017, Mr. Jackson called in sick to Ms. Pilkington about an hour after drivers typically arrive. Ms. Pilkington was planning to terminate Mr. Jackson that day because of his refusal to haul the load the previous day. (TR at 112, 203, 213).

27. Mr. Jackson was fired by letter dated May 24, 2017. Ms. Pilkington, the sole decision-maker, decided to terminate Mr. Jackson because he "walked off the job and refused to haul the load" and because of the incidents leading up to May 22nd involving verbal and then written reprimands. According to Ms. Pilkington, Mr. Jackson's conduct on May 22, 2017, was the "final straw" in a pattern of performance problems over a short amount of time. (RX-6; TR at 213, 258).

28. Mr. Jackson made handwritten notations to a list of his daily work from Saturday 5/20/2017 through Friday 5/26/2017, the last week that he worked for Doubleback.

Mr. Jackson wrote "unsafe truck" next to 5/20, 5/21, and 5/22. His notations were made after-the-fact and no problems were recorded on the DVIRs turned in for those days. (CX-14, p. 2; RX-3).

IV. APPLICABLE LAW AND ANALYSIS

In relevant part, the employee protection provision of the STAA provides as follows:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because:
>
> > (A) 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 vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; []
> >
> > (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[.]

49 U.S.C. § 31105(a)(1)(B).

Under the current version of the 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 21st Century ("AIR 21"). *See* 49 U.S.C. § 42121(b)(2011); 49 U.S.C. § 31105(b)(1).

To prove a STAA violation, the complainant must show by a preponderance of the evidence that his safety complaints to his employer were protected activity, that the company took an adverse action against him, and that his protected activity was a contributing factor in the adverse action. *See Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). *See also,* 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in an STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity … contributed to the adverse action at issue."). If Mr. Jackson does not prove one of these requisite elements, his entire claim fails. *West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

"[O]nce an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101 and

06-159, ALJ No. 2005-STA-63 at 7 (ARB June 30, 2008). *See also Williams v. U.S. Dep't of Labor*, 157 Fed.Appx. 564, 2005 WL 3087895 (4th Cir. 2005) (teacher's whistleblowing activities initially protected but lost their protected status after resolution of her safety complaints); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020 (ARB Nov. 12, 1996) (finding that when employer fully responded to his safety concerns, employee's continued complaints about them not protected).

I considered in this matter that Mr. Jackson was self-represented. A litigant's *pro se* status is given some consideration on matters of procedure. *See e.g., Pike v. Public Storage Companies, Inc*., ARB No. 99-072, ALJ No. 98-STA-35 (ARB Aug. 10, 1999) (*pro se* litigants may be held to a lesser standard than legal counsel in procedural matters). However, *pro se* complainants do not have a lesser burden of proving the elements necessary to sustain a claim of discrimination. *See Flener v. H.K. Cupp, Inc*., 90-STA-42 (Sec'y Oct. 10, 1991).

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel action, the employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected behavior. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010). *See also Warren v. Custom Organics*, ARB No. 10-092, slip op. at 12 (ARB Feb. 29, 2012). Clear and convincing evidence is the intermediate burden of proof, in between preponderance of evidence and proof beyond reasonable doubt. The clear and convincing evidentiary standard requires "evidence indicating that the thing to be proved is highly probably or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (citation omitted).

Mr. Jackson has not established his *prima facie* case by a preponderance of the evidence.

Pursuant to the legal framework cited above, Mr. Jackson must initially make a *prima facie* showing that his protected activity was a contributing factor in his termination by the Respondent. If Mr. Jackson satisfies his *prima facie* case by a "preponderance of the evidence," the burden shifts to the Respondent to demonstrate by "clear and convincing evidence" that it would have terminated Mr. Jackson even absent the protected activity.

Complainant's protected activity and Employer's knowledge of the activity

Mr. Jackson has established that he initially engaged in protected activity within the meaning of the STAA, and Employer has not disputed awareness of the initial protected activity. However, Mr. Jackson's concerns were addressed and resolved, rendering it unreasonable for Mr. Jackson to continue to claim that safety violations or concerns justified his refusal to operate the vehicle. Therefore, his initially protected activities became activities no longer protected in nature within the meaning of the Act.

The Act prohibits retaliation by an employer where an employee refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). This is known as the "actual violation" provision of the STAA.

The Act also protects an employee from retaliation where the employee refuses to operate a vehicle because 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." 49 U.S.C. § 31105(a)(1)(B)(ii). This is known as the "reasonable apprehension" provision of the STAA.

Mr. Jackson has presented certain Department of Transportation ("DOT") regulations without, however, articulating whether he refused to operate Employer's truck because of an actual violation of a regulation or standard, or due to his reasonable apprehension of serious injury to himself or the public because of an unsafe condition. (CX-12). Therefore, I will address his claims as potentially alleging both types of protected activity.

The DOT regulations submitted by Mr. Jackson address the following:

- Driver inspections at 49 C.F.R. § 396.13, requiring that before driving a motor vehicle, the driver shall be satisfied that the motor vehicle is in safe operating condition; review the last driver vehicle inspection report; and the "[s]ign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed."
- Equipment, inspection and use at 49 C.F.R. § 392.7, stating that "[n]o commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order": service brakes, including trailer brake connections; parking (hand) brake; steering mechanism; lighting devices and reflectors; tires; horn; windshield wiper(s); rear-vision mirror or mirrors; and coupling devices.
- Emergency equipment, inspection and use at 49 C.F.R. § 392.8, stating that no commercial motor vehicle shall be driven unless the driver is satisfied that emergency equipment required by DOT regulations is in place and ready use. Emergency equipment at § 393.95 includes fire extinguishers.
- Safe loading at 49 C.F.R. § 392.9, prohibiting the driving of a commercial motor vehicle unless the cargo is properly distributed and adequately secured as specified in DOT regulations; the tailgate, tailboard, doors, tarpaulins, spare tire and other equipment, and means of fastening cargo are secured; and no cargo or other object obscures the driver's views or interferes with the driver's movements.
- Lubrication at 49 C.F.R. § 396.5, requiring every motor carrier ensure that each motor vehicle subject to its control is properly lubricated and free of oil and grease leaks.
- Unsafe operations forbidden at 49 C.F.R. § 396.7, stating that any motor vehicle "discovered to be in an unsafe condition while being operated on the highway may be continued in operation only to the nearest place where repairs can safely be effected. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway." Section 392.64 of the regulations prohibit riding within the closed body of a commercial motor vehicle "unless there are means on the inside thereof of obtaining exit" and "permit ready operation by the occupant."

(CX-12).

As noted above, Mr. Jackson was not a good historian and presented information about various complaints he made about Respondent's trucks in a disorganized fashion and often without reference to dates, how his complaints were conveyed, and to whom they were conveyed. With the exception of Mr. Jackson's notes on his April 30, 2017, DVIR about problems with truck no. 57, and verbal complaints about the same truck on May 22, 2017, Mr. Jackson alleged primarily broad and/or scattered complaints about the Respondent's truck fleet in general and did not establish that he successfully communicated such complaints to Respondent. Mr. Jackson's formal Complaint filed in this proceeding also focused on the April 30, 2017, DVIR and his activities on May 22, 2017, as did his post-hearing brief. (TR at 87-88, 177, 179; Complaint dated Feb. 5, 2019). Accordingly, based on the credibility determinations and findings of fact herein, the credible evidence reflects Mr. Jackson reported concerns with a specific truck (no. 57) on two occasions of which Respondent was aware – April 30, 2017, and May 22, 2017. Therefore, his activities on these occasions, and Respondent's awareness and responses to such conduct, are examined more closely below.

April 30, 2017

The DVIR for April 30, 2017, reflects that Mr. Jackson requested that the brakes and steering (right front tire) of truck no. 57 be checked. Notably, Mr. Jackson did not check any category of the truck or tractor equipment as a "defective item," even though the form provides a place to check defects regarding brakes, steering, and tires, among other things. (CX-14, p. 1). Mr. Jackson also successfully drove truck no. 57 that day for a roundtrip haul totaling 383 miles over 9.50 on-duty hours. He checked on the DVIR form that the "condition of the above vehicle is satisfactory" and signed and dated the form. (Id.). The issues that Mr. Jackson asked to be checked on April 30, 2017, were addressed. (TR at 213-14).

It is not clear that Mr. Jackson's notes on his April 30th DVIR qualify as protected activity, as he did not report defects of the truck or trailer, did not identify an issue of safety affecting him or the public, and his completion of a 383-mile haul indicates that he did not appreciate a hazardous condition that prevented operating truck no. 57 that day. Mr. Jackson has not identified an actual violation of applicable regulation, standard or order concerning the condition of truck no. 57 on April 30, 2017. He also has not shown that he had reasonable apprehension of serious injury to himself or the public because of a hazardous safety or security condition. However, even if Mr. Jackson's reports on April 30, 2017, are deemed protected activity, the evidence reflects that they were addressed and resolved by Respondent. Mr. Jackson drove truck no. 57 that day, and again on May 19, 20, and 21, 2017, without incident or report of operational concerns. (RX-3). The new complaints that he raised on May 22, 2017, are addressed in more detail below. I conclude that any initially protected activity, based on Mr. Jackson's reports of truck no. 57's condition on April 30, 2017, were addressed and resolved, such that the activity loses its characterization as protected. *Cf. Carter v. Marten Transport, Ltd., supra* (complainant's complaints regarding motor vehicle safety issues remained protected activity under the STAA where mechanic resolved some but not all problems related to motor vehicle safety regulations); *Patey, supra*.

May 22, 2017

On May 22, 2017, Mr. Jackson verbally reported problems with truck no. 57 shaking, such that he turned around and returned the vehicle to Respondent's shop. Once there, he told Mr. Fuller and Ms. Pilkington of his concerns about the truck shaking, hot air entering the cab, and that cruise control was not operating properly. As for the shaking of the truck, Mr. Jackson established by a preponderance of the evidence that he initially engaged in protected activity on May 22, 2017, by refusing to operate his truck because shaking either violated a DOT regulation or because he had a reasonable apprehension of serious injury to himself or to the public because of this condition. *See* 49 C.F.R. 392.7 (tires must be in good working order before a commercial motor vehicle is driven); 49 U.S.C. §§ 31105(a)(1)(B)(i) and (ii). However, there is no dispute that Respondent ensured that a new tire was installed on the truck and performed a test drive during which no shaking was observed.

As for Mr. Jackson's complaints about the heater hose and cruise control, Mr. Jackson did not establish that his complaint about the heat in the cab or the operation of the cruise control contemplated an actual violation of a regulation, standard or order. Mr. Jackson has presented a number of DOT regulations, none of which address the safety of the conditions he reported on May 22, 2017, other than the safety of tires (49 C.F.R. § 392.7). (CX-12). Nor has he demonstrated he had a reasonable apprehension that a hazardous condition existed that would endanger himself or others. Also, it is not disputed that the heater hose was disengaged to prevent hot air coming into the cab. Further, truck no. 57 was test driven to the same location where Mr. Jackson had turned around earlier that day and returned back to the shop without observation of any shaking or other defect, before Mr. Jackson was asked to resume his operation of truck no. 57. Because Mr. Jackson refused to drive the truck, another employee successfully operated truck no. 57 and completed a haul totaling 383 miles that day, over a period of 8.75 driving and on-duty hours,. The driver reported that the truck's condition was satisfactory. (RX-4; TR at 142-43, 221).

Pursuant to my credibility determinations and findings of fact herein, I find that Mr. Jackson walked off the job and continued to refuse to drive truck no. 57, but his actions were not reasonable or justified because the concerns he raised that day had been addressed and resolved. Mr. Jackson repeatedly refused to drive truck no. 57, stating feelings of discomfort regardless of what actions Respondent took to address his concerns. (CX-16). In fact, Mr. Jackson stated he would not drive the truck before any corrective actions were even taken. He acknowledged that another driver would have to take over the haul Mr. Jackson was scheduled to perform. (Id.). Mr. Jackson does not dispute that Respondent changed the tire, resolved the shaking as demonstrated by a successful test-drive and subsequent haul by different employee, addressed the heater-hose concern, and assessed that no cruise-control issue affected safe operation of the truck. Mr. Jackson has not pointed to DOT regulation or other evidence to indicate that the Respondent's position regarding the safety of the tire, heat in the cab, and/or cruise control was not reasonable or did not result in resolution of his concerns. I find that any apprehension Mr. Jackson continued to have or express regarding operation of truck no. 57 was not reasonable under the Act.

For these reasons, any initial protected activity of Mr. Jackson on May 22, 2017, was rendered activity that is no longer protected within the meaning of the Act. *See Patey, supra.* In *Patey*, the employee, a commercial motor vehicle driver, had complained to his employer about his discomfort using his truck's fuel line to refuel locomotives in a process called "wet-line fueling." The complainant reported trouble with wet-line fueling due to darkness and poor lighting, which resulted in a poor connection and fuel spillage that was occurring around sparks. The employer responded to the complainant's concerns by putting lights on the complainant's truck (rather than having him rely on flashlights) and providing more support for the hoses to prevent leakage. Complainant continued to feel uneasy and announced he would not engage in wet-line fueling anymore. The employer then advised there was no further work for him. The administrative law judge concluded that the complainant's concerns regarding the safety of the wet-line operation had been addressed, and, therefore, the complainant's refusal to perform his scheduled work was not reasonable under the circumstances. The complainant, thus, was not terminated because of a justified refusal to perform an unsafe job. *Patey*, ARB No. 96-174, ALJ No. 1996-STA-020, slip op. at 5. *See also Carter, supra*. Like the employee in *Patey*, Mr. Jackson voiced his discomfort associated with the operation of his vehicle. Mr. Jackson repeated on May 22, 2017, that he felt the truck was not safe in his view (asserting that if he felt the truck was not "up to par, it's no up to par") (CX-16), but he did not articulate an actual violation or reasonable apprehension of a safety hazard after the Respondent took corrective action.

I conclude that Mr. Jackson has not established an essential element of his *prima facie* case, i.e., participation in protected activity. Given my conclusion as to the loss of the protected nature of Mr. Jackson's activity, it is not necessary to address the remaining elements of his burden of proving an adverse employment action, whether protected activity was a contributing factor to the adverse action, and whether Respondent met its burden of proving that it would have terminated Mr. Jackson regardless of his protected activity.

Alternatively, I note that it is not disputed Respondent was aware of Mr. Jackson's reports regarding truck no. 57 on April 30 and May 22, 2017, considering the evidence establishing that the concerns were addressed and resolved by Respondent. I also note that Mr. Jackson was terminated on May 24, 2017, which constitutes an adverse employment action. Additionally, close temporal proximity alone may be sufficient to establish a causal connection in a whistleblower case, and thus establish that protected activity was a contributing factor in the adverse employment action. *See Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, slip op. at 12 (ARB Mar. 28, 2012) (citing *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, slip op. at 8 (ARB Dec. 30, 2004), *aff'd sub nom. Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006)). *See also Reiss v. Nucor Corp.*, ARB No. 08-137 (ARB Nov. 30, 2010) (temporary proximity of two days sufficient to establish protected activity was a contributing factor in an adverse employment action). As such, the proximity between Mr. Jackson's activity on May 22, 2017, if it did not lose its characterization as protected activity, and his termination on May 24, 2017, would suffice to infer a causal connection, and Mr. Jackson would establish a *prima facie* case. However, Respondent also carried its burden of proving by clear and convincing evidence that it would have terminated Mr. Jackson regardless of protected conduct. Mr. Jackson had already been reprimanded verbally and in writing for performance problems in the month prior to his termination. The sole decision-maker regarding Mr. Jackson's progressive discipline and his termination, Ms. Pilkington, testified consistently and credibly that Mr. Jackson's refusal to drive the truck, once it was in satisfactory working condition, was the "final

straw" in a pattern of performance problems over a short amount of time. (TR at 213, 258). The evidence of record was thus sufficient to show it was highly probable or reasonably certain that Respondent would have terminated Mr. Jackson regardless of his protected activity.

V. RECOMMENDED ORDER

Because Complainant failed to demonstrate an essential element of his Complaint, it is recommended that the Complaint be DISMISSED.

ORDERED this 8th day of October, 2019, at Covington, Louisiana.

ANGELA F. DONALDSON
ADMINISTRATIVE LAW JUDGE