



In the Matter of:

KEVIN BERGMAN,

ARB CASE NO. 03-155

COMPLAINANT,

ALJ CASE NO. 2004-STA-19

v.

DATE: April 29, 2005

SCHNEIDER NATIONAL,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kevin Bergman, pro se, Brigham City, Utah

For the Respondent:

Nan Bassett, Esq., Kipp and Christian, P.C., Salt Lake City, Utah

FINAL DECISION AND ORDER

Kevin Bergman filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2005), alleging that his employer, Schneider National, violated § 31105 of the STAA when it terminated his employment because he refused to drive a truck. On March 9, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing Bergman's

complaint. The R. D. & O. is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1) (2004).¹

STANDARD OF REVIEW

Under the STAA, the ARB is bound by the ALJ's findings of fact if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 2005). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there is a causal connection between the protected activity and the adverse action. *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

Activity protected under STAA includes filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B).

The ALJ determined as a matter of fact that Schneider fired Bergman because he refused to take a random drug test. The ALJ ruled as a matter of law that refusal to take a random drug test is not a protected activity. R. D. & O. at 3. On the contrary, she noted,

¹ On March 12, 2004, the ARB issued a Notice of Review and Briefing Schedule to counsel for Schneider National and to Bergman, acting pro se. The ARB received postal cards indicating that both parties had received the briefing notice. Schneider National submitted a notice of intent not to file a brief. Bergman made no response to the Notice of Review.

motor vehicle safety regulations prohibit an employer from permitting a driver who refuses to take a random drug test to “perform or continue to perform safety-sensitive functions.” *Id.*, citing 49 C.F.R. § 382.211. Accordingly, the ALJ dismissed Bergman’s complaint for failure to establish that he engaged in protected activity, an essential element of his case. *Id.*

Because the parties agree that Schneider fired Bergman due to his refusal to take a random drug test, substantial evidence on the record as a whole supports the ALJ’s finding of fact to this effect. It is therefore conclusive. 29 C.F.R. § 1978.109(c)(3). In her thorough, well-reasoned discussion, the ALJ was correct to conclude that refusing to take a random drug test is not protected because it is not activity that falls within the STAA’s enumerated protected activities. Therefore, we adopt the ALJ’s decision, attach and incorporate the R. D. & O., and **DENY** Bergman’s complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge