In the Matter of:

ARTIS ANDERSON,

COMPLAINANT,

v.

JARO TRANSPORTATION SERVICES and McGOWAN EXCAVATING, INC.,

RESPONDENTS.

ARB CASE NO. 05-011

ALJ CASE NOS. 2004-STA-2
2004-STA-3

DATE: November 30, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Artis Anderson complains that his employer, McGowan Excavating, Inc., and Jaro Transportation Services, with whom McGowan contracted, violated the employee protection (whistleblower) provisions of the Surface Transportation Assistance Act (STAA),[1] as amended, when his employment was terminated in December 2002. A United States Department of Labor Administrative Law Judge (ALJ) recommended that Anderson's complaints be denied. We concur and deny the complaints.

BACKGROUND

McGowan Excavating Inc.'s primary business was excavation, but it also contracted with Jaro Transportation Services to haul aluminum ingots from Berea, Kentucky to Russellville, Kentucky, a distance of 184 miles. McGowan hired Artis

[1] 49 U. S.C. A. § 31105 (West 1997). The STAA's implementing regulations are found at 29 C.F.R. Part 1978 (2005).

Anderson in August 2001 as an independent contractor truck driver.[2] Anderson's job was to haul the ingots in a flatbed tractor trailer. McGowan paid him a flat rate for each trip. Anderson was on call 24 hours a day and was required to call Jaro's dispatcher, Brenda Daniels, every two hours during the day to determine if a load was ready for pick up in Berea. Transcript (TR) 27-31.

In July 2002 Daniels informed Anderson that Jaro now required the ingot haulers to complete the trip between Berea and Russellville in a minimum of six-hours or risk being fined. TR 36. In a meeting later that month with Selena McGowan, a co-owner of McGowan Excavating, Anderson discussed his concerns about the new six-hour rule. Anderson was worried that since he was on call 24 hours a day, he might have to pick up a load late at night when he was tired and then have to drive straight through from Berea to Russellville in order to comply with the new rule. This, he told McGowan, might create a safety risk. TR 42-42, 155-157. And, in fact, if Anderson was dispatched to pick up a load of ingots between 11:00 P.M. and 5:00-6:00 A.M., he would usually pick up the load but then park his truck and trailer and sleep until early the next morning when he would resume the trip to Russellville. TR 64-71.

In late August 2002, McGowan learned that Anderson was not delivering the ingots on time, and she verbally warned him that he needed to correct this problem. TR 111, 128. Thereafter, in late October or early November 2002, Anderson filed a written complaint with the United States Department of Transportation (DOT). He informed DOT that, by insisting upon the six-hour rule, Jaro and McGowan were creating a safety problem.[3] TR 60-61. Later in November, Jim Steffey, Jaro's President, called Anderson, and they amicably discussed Anderson's DOT filing. Then, in early December, after finding out that Anderson was parking the tractor and the trailer, fully loaded with ingots, several miles away from the route between Berea and Russellville, McGowan issued a second warning to Anderson. McGowan warned Anderson about this activity because when he stopped driving the load to Russellville and pulled over to rest or sleep, he not only delayed the shipment but also created potential insurance problems for Jaro because its insurer insured the load when it was on the trailer. TR 128-130. Eventually, on

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[2] The STAA covers independent contractors. *See* 49 U.S.C.A. § 31101(2) (defining an "employee" as a driver of a commercial motor vehicle, "including an independent contractor when personally operating a commercial motor vehicle"). *See also* 29 C.F.R. § 1978.101(d).

[3] The record does not contain a copy of Anderson's DOT complaint. Presumably, Anderson was claiming that the six-hour rule violated 49 C.F.R. § 392.3, which forbids motor carriers from requiring drivers to drive when their "ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

December 17, 2002, McGowan fired Anderson because of the late deliveries and parking off the route.[4]

Anderson filed two STAA complaints, first against Jaro on January 6, 2003, and then against McGowan on February 18, 2003. The Department of Labor's Occupational Safety and Health Administration (OSHA), as it is required to do, investigated Anderson's complaints but found no STAA violations.[5] Anderson objected to OSHA's findings and requested a hearing before an Administrative Law Judge (ALJ).[6] After a hearing on April 27, 2004, the ALJ issued a Recommended Decision and Order (R. D. & O.) denying Anderson's complaints. We automatically review an ALJ's recommended STAA decision.[7] Despite being invited to do so, neither Anderson, Jaro, nor McGowan filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB.[8] Under the STAA, the ARB is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings.[9] Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10]

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[4] The record is silent as to whether Anderson continued to make late deliveries and park off the route between McGowan's early December 2002 warning and the December 17, 2002 termination.

[5] *See* 29 C.F.R. §§ 1978.102, 1978.103, 1978.104.

[6] 29 C.F.R. § 1978.105.

[7] 29 C.F.R. § 1978.109.

[8] 49 U.S.C.A. § 31105(b)(2)(C); *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

[9] 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).

[10] *Clean Harbors Envtl. Servs. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

We accord special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses."[11] This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records."[12]

In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's Designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." [13] Therefore, we review the ALJ's conclusions of law de novo.[14]

DISCUSSION

1. The Legal Standard

The STAA prohibits an employer from discharging, disciplining, or discriminating against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These activities include making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order."[15] Protected activity also includes "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," and "refus[ing] 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 unsafe condition."[16] These two categories of work refusal are commonly referred to as the "actual violation" and "reasonable apprehension" subsections.[17] While

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[11] *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983); *Poll v. R.J. Vyhnalek,* ARB No. 98-020, ALJ No. 96-ERA-30, slip op. at 8 (ARB June 28, 2002).

[12] *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

[13] 5 U.S.C.A. § 557(b) (West 2004).

[14] *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).

[15] 49 U.S.C.A. § 31105(a)(1)(A). *See Zurenda v. J & R Plumbing & Heating Co., Inc.*, ARB No. 98-088, ALJ No. 97-STA-16, slip op. at 5 (ARB June 12, 1998) ("Under STAA a safety complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity.").

[16] 49 U.S.C.A. § 31105(a)(1)(B)(i),(ii).

[17] *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 02-STA-5, slip op. at 3 (ARB July 31, 2003).

subsection (1)(B)(i) deals with conditions as they actually exist, section (1)(B)(ii) deals with conditions as a reasonable person would believe them to be. Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding such refusal under the particular requirements of each of the provisions.[18]

The ALJ recommended that Anderson's complaint be denied because "Anderson did not meet his burden of proof in establishing a *prima facie* case of discriminatory treatment under the STAA." R. D. & O. at 15. According to the ALJ, "at a minimum" Anderson had to "present evidence sufficient to raise an inference of causation" between protected activity and the adverse actions he suffered. *Id.* at 9. But the ALJ misstates Anderson's burden of proof. To prevail, Anderson must prove by a preponderance of the evidence that he engaged in protected activity, that Jaro and McGowan were aware of the protected activity, that Jaro and McGowan discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action.[19] If Anderson does not prove each of these elements by a preponderance of the evidence, his STAA claims fail. Though the ALJ did not apply the correct standard of proof, nevertheless we will examine the record to determine if substantial evidence supports the ALJ's findings.

2. Jaro

When Anderson filed his DOT complaint against Jaro and McGowan in late October or early November 2002, he engaged in STAA-protected activity because he made a complaint relating to a violation of a commercial motor vehicle regulation, to wit, the rule about driving while fatigued. Furthermore, Jaro knew about the DOT complaint because Steffey, its president, discussed it with Anderson.

But Anderson's claim against Jaro fails because Jaro did not take adverse action against him. Anderson's whistleblower complaint to OSHA alleged that Jaro discharged him because of the DOT filing. Administrative Index, Tab 1. McGowan, however, not Jaro, employed Anderson and reprimanded and terminated his employment. Nor did Jaro influence McGowan to fire him. TR 87. But Anderson testified, in essence, that Jaro blacklisted him. The ALJ took this as an allegation of adverse action. R. D. & O. at 12.

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[18] *See Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5, slip op. at 7-8 (ARB Mar. 29, 2000) (the ALJ properly considered all the circumstances of the complainant's refusal to drive, including his work record and medical excuses).

[19] *See BSP Trans, 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); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

Anderson claimed that after he had been fired, he had given Jaro's name to potential employers and that Jaro had informed one of these potential employers, Heartland Express, that he had been discharged. As a result, Anderson testified, Heartland did not hire him. TR 92; Jaro Exhibit. Anderson, however, did not know what Jaro had told Heartland. He knew only that Heartland had received "some information" from Jaro. TR 92.

"Blacklisting occurs when an individual or group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment."[20] Anderson must show that a specific act of blacklisting occurred. Furthermore, a whistleblower's subjective feeling that an employer blacklisted him is insufficient to establish blacklisting.[21] Therefore, like the ALJ, we find that since Anderson cannot specify what, if anything, Jaro may have told Heartland Express or that it caused Heartland to deny him employment, he has not demonstrated that Jaro blacklisted him or took any other adverse action against him, a necessary element of his STAA whistleblower claim against Jaro. For this reason, we must deny Anderson's claim against Jaro.

3. McGowan

Anderson testified that he told McGowan in early December 2002 that he had filed the DOT complaint against McGowan Excavating and Jaro. TR 44. Selena McGowan testified that she did not learn about Anderson's complaint to DOT until she attended his unemployment compensation hearing in January 2003. TR 113. The ALJ, who found McGowan credible and Anderson not credible, found that Anderson did not prove that McGowan knew about the protected DOT complaint until after she terminated his employment. R. D. & O. at 6-8, 14. Substantial evidence supports a finding that Anderson did not prove by a preponderance of the evidence that McGowan knew about the DOT complaint. Thus, Anderson did not prove, as he must, that McGowan took adverse action against Anderson because he filed a complaint with DOT.

Furthermore, since Anderson did not show that he reasonably apprehended serious injury, the ALJ found that Anderson did not engage in protected activity when he was dispatched to drive the ingots straight through from Berea to Russellville late at night but refused to do so. The ALJ based this finding on Anderson's credibility and the fact that Anderson never told McGowan or the dispatcher that he was afraid that illness or fatigue might cause him driving problems at night. The evidence also indicated that other drivers hauling ingots between Berea and Russellville did not have problems making the

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[20] *Pickett v. Tennessee Valley Auth.*, ARB Nos. 00-56, 00-59, ALJ No. 01-CAA-18, slip op. at 6 (ARB Nov. 28, 2003) (citations omitted).

[21] *Id.*, slip op. at 7.

trip in less than six hours.[22] We agree with this finding since substantial evidence on the record as a whole supports it.

But the ALJ erred in not finding that Anderson engaged in protected activity when he informed McGowan in July 2002 that the new six-hour rule presented a safety issue. Anderson testified that he told McGowan about his concerns respecting the six-hour rule, and McGowan testified that he told her that the rule "might raise a potential safety risk." TR 42, 157. Therefore, Anderson proved by a preponderance of the evidence that he made a protected complaint to a supervisor related to a potential violation of the commercial motor vehicle rule pertaining to driving while fatigued.[23]

Even so, Anderson did not demonstrate, as he must, that his conversation with McGowan about the six hour rule caused her to reprimand him and later terminate his employment. True, the lapse of six months between the July protected activity and the December termination is not too long a time period from which to infer that McGowan was retaliating.[24] Here, however, after he complained to McGowan about the six-hour rule in July, Anderson did not make timely deliveries and parked the tractor-trailer off the route. Because these intervening events reasonably could have caused McGowan to reprimand and terminate Anderson's employment, a logical reason to infer a causal relationship between the protected activity and the adverse action no longer exists.[25] Nor does Anderson's testimony that McGowan was "irate" during a meeting they had in early December 2002 tend to prove discrimination. McGowan was not angry because Anderson complained to her about the six-hour rule or because he had complained to DOT (which she did not know about until January 2003), but rather because Anderson was continuing to delay the ingot deliveries and park off route. TR 44, 72-73. Thus, McGowan's anger in December 2002, if any, does not evidence a retaliatory state of mind.

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[22] The ALJ did not discuss whether Anderson engaged in protected activity under the other category of STAA work refusal, namely, refusing to drive because to do so would violate a commercial motor vehicle safety or health regulation, standard or order. *See* 49 U.S.C.A. § 31105 (a)(1)(B)(i). Anderson did not present evidence that he engaged in this type of STAA-protected activity. Nor, as we noted, did he brief this issue.

[23] *See* 49 U.S.C.A. § 31105(a)(1)(A); *Zurenda,* slip op. at 5; 49 C.F.R. § 392.3.

[24] *See Goldstein v. Ebasco Constructors, Inc.,* 86-ERA-36 (Sec'y April 7, 1992), *rev'd on other grounds sub nom. Ebasco Constructors, Inc. v. Martin,* 986 F.2d 1419 (5th Cir. 1993) (causation established where seven or eight months elapsed between protected activity and adverse action).

[25] *Tracanna v. Arctic Slope Inspection Serv.,* ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001).

Finally, Anderson has not demonstrated that McGowan's reasons for reprimanding and later firing him−the delivery delays and the off route parking−are false. Discrimination may be inferred when a whistleblower shows, by a preponderance of the evidence, that the employer's reasons for taking adverse action are false.[26] The ALJ found that McGowan's reasons for taking adverse action against Anderson were legitimate and non-discriminatory, and substantial evidence in the record supports this finding.

Thus, though the record contains substantial evidence that Anderson engaged in protected activity when he complained to McGowan about the new six-hour rule, he did not sufficiently link this activity to McGowan's later reprimands and his termination. Nor did he adequately prove that McGowan was aware of his protected DOT filing. Therefore, like the ALJ, we conclude that Anderson's claim against McGowan must be denied.

CONCLUSION

Anderson did not prove that Jaro took adverse action against him because he did not show by a preponderance of the evidence that it blacklisted him. Nor did Anderson prove by a preponderance of the evidence that McGowan reprimanded and terminated his employment because he complained to her about the six-hour rule. Thus he did not prove causation. Since Anderson failed to sufficiently prove these essential elements of his STAA claims, we **DENY** both complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[26] *See, e.g., Densieski* slip op. at 4. A whistleblower must still prove by a preponderance of the evidence that the employer discriminated because of protected activity. *Id.*