In the Matter of:

LARRY G. WAINSCOTT, **ARB CASE NO. 05-089**

COMPLAINANT, **ALJ CASE NO. 2004-STA-054**

DATE: October 31, 2007

v.

PAVCO TRUCKING, INC., INNOVATIVE PERSONNEL SOLUTIONS, and BASF CORP.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mary C. McCormac, Esq., Clemson, South Carolina

For the Respondents:
John M. Nader, Esq., *Tilford, Dobbins, Alexander, Buckaway & Black, L.L.P.*, Louisville, Kentucky for Pavco, and Charles S. Carter, Esq., *McNair Law Firm, P.A.*, Raleigh, North Carolina, for BASF.

FINAL DECISION AND ORDER

Larry G. Wainscott filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997)[1], and its implementing regulations, 29 C.F.R. Part 1978 (2007),

[1] The STAA has been amended since Wainscott filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

alleging that Pavco Trucking, Inc., Innovative Personnel Solutions (IPS),[2] and BASF Corporation violated the STAA in terminating his employment because he refused to drive in adverse weather conditions. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) found that Pavco and IPS had not violated the STAA and dismissed Wainscott's complaint. He appealed to the Administrative Review Board (ARB). We affirm.

BACKGROUND

Pavco employed Wainscott as a truck driver to pick up and deliver pressurized cylindrical tanks of urethane resin, which is designated hazardous material (HAZMAT), for the BASF Corporation.[3] Pavco owned its flatbed trailers but contracted with Ryder Truck Rental to lease the tractor trucks, which it kept and serviced at a Ryder facility in Anderson, South Carolina.

On January 26, 2004, Wainscott set out from Bude, Missouri, to deliver a load of two tanks to BASF's plant in Central, South Carolina. Hearing Transcript (TR) at 103. He had reached Atlanta, Georgia, about 7:30 that evening when he heard reports of bad weather and an accident on northbound Interstate 85 between exits 14 and 19. TR at 104. Wainscot testified that it started to freeze when he reached South Carolina. TR at 105.

Instead of taking exit 11 off I-85 to wait out the bad weather at the Ryder facility at Anderson, Wainscott continued northwest to exit 14 and took a "shortcut" on Highway 187 to reach Route 76. TR at 105-06, 146-47. This four-lane road intersects Highway 93, which leads directly to the BASF Central plant. Respondent's Exhibit (RX) 1. However, the weather worsened, and Wainscott veered off 93 onto Highway 123 to connect with Route 27, which also leads to the plant. TR at 150-54. Later, Wainscott decided not to take Route 27, a "narrow little road" about two miles from the BASF

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[2]. Innovative Personnel Solutions (IPS) contracted with Pavco to perform employee services such as issuing payroll checks with appropriate deductions, administering insurance, health, and savings plans, and reimbursing expenses. Hearing transcript (TR) at 213-14, 278-79. IPS did not appear at the hearing or participate in the proceedings before the ALJ. *See* discussion, *infra*.

[3] The BASF plant in Central, South Carolina mixes isocynate with urethane resin to make a foamy mixture, "best described as shaving cream," TR at 334, which must be kept in pressurized tanks during delivery to BASF customers. BASF's product, which is used in boat-building and as a shipping material, is designated as hazardous material. TR at 48. BASF has about 3,000 tanks to carry this product and tracks each of them by individual numbers. TR at 338. In emptying a tank, the customer uses only up to 95 percent of the contents so as to preserve the pressure inside. TR at 49. When the tank is returned, the customer gets a credit for the unused portion, depending on the amount left inside. TR at 335. Only rarely is a tank returned empty because the remnants of the product will be spoiled and the customer will lose money. *Id.*

plant, and pulled into a lay-by, a wide bend in the road, where he unhooked his tractor from the flatbed trailer carrying the tanks. TR at 113, 122. Wainscott then drove the tractor to his home in Liberty, five to six miles away. TR at 121-22, 141.

About 9:30 a.m. the next morning, Terry Roy, Pavco's president, learned in a voice mail message from BASF's plant manager, Larry Keifer, that a HAZMAT trailer had been left by the side of the road. Later, Wainscott called Pavco's head dispatcher, Mia Cato, and told her that his tractor was stuck in his driveway at home and that he had left the trailer in a safe spot along the road. Cato testified that Wainscott told her the trailer was not a HAZMAT load because the tanks were not pressurized. She told him that he needed to get the trailer back to BASF. TR at 199. Later that day, she spoke again with Wainscott, who had still not returned the trailer.

Another Pavco dispatcher, Sandra Lancaster, received a call about 5:00 p.m. on January 27, 2004, from Carl Williams, traffic manager at BASF, who was very upset that he had seen a HAZMAT trailer parked along the road. TR at 175. Lancaster called Wainscott and asked him to move the trailer over to BASF. Some words were exchanged, and Lancaster handed the telephone to Terry Roy who asked Wainscott to deliver the trailer to BASF that evening. When Wainscott said he would not, Roy asked him to "do me a favor" and deliver it before 7:00 a.m. the next morning before the BASF employees came to work so that Roy would not get another phone call. Wainscott said he would. TR at 228-29.

Early on January 28, 2004, Roy arrived at the office and retrieved another voice mail saying that the BASF trailer was still on the side of the road. Meanwhile, Wainscott sanded and salted his driveway and was able to move the tractor. He picked up the trailer and arrived at the BASF Central plant at 8:27 a.m. When Wainscott called dispatch, Roy asked him why he was late and then told him to clean out his tractor and take it to the Ryder facility in Anderson. TR at 230-31. Roy testified that he was counting on Wainscott to deliver the HAZMAT trailer by 7:00 a.m. to "avoid having another problem" with the BASF account. TR at 231-32.

In a February 4, 2004 memorandum to IPS, Cora Bary, a Pavco safety clerk, explained that Wainscott was fired for dropping his HAZMAT load on the side of the highway and taking his tractor home without authorization, both "direct violations of company policies." Complainant's Exhibit (CX) 9. The memo noted that BASF shipments could be dropped only at the plant in Central or at the Ryder truck facility in Anderson, South Carolina.

Wainscott filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on May 4, 2004, alleging that he had been fired for refusing to operate his tractor-trailer in adverse weather conditions. CX 5. OSHA found no merit in the complaint, and Wainscott requested a hearing, which was held on December 14-15, 2004.

JURISDICTION AND STANDARD OF REVIEW

By authority of 49 U.S.C.A. § 31105(b)(2)(C), the Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

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. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004). 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." *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. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

Substantial evidence does not, however, require a degree of proof "that would foreclose the possibility of an alternate conclusion*." BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998). Also, whether substantial evidence supports an ALJ's decision "is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion." *Dalton v. U.S Dep't of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 2003), citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989).

We accord special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses." *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983); *Poll v. R.J. Vyhnalek*, ARB No. 98-020, ALJ No. 1996-ERA-030, slip op. at 8 (ARB June 28, 2002). This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records." *Pogue v. U.S Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

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 . . . ." 5 U.S.C.A. § 557(b) (West 2004). 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. 2001-STA-022, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

We consider whether Wainscott established by a preponderance of the evidence that Pavco fired him because of his refusal to drive.

The legal standard

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" 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 include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "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," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "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," 49 U.S.C.A. § 31105(a)(1)(B)(ii).[4]

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 the protected activity was the reason for the adverse action. *BSP Trans, Inc.*, 160 F.3d at 45; *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. Nat'l Welders Supply,* ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-033, slip op. at 8-9 (Oct. 31, 2003). Failure to prove any one of these elements results in dismissal of a claim.

The ARB has held that, in a case tried fully on the merits such as this, the relevant inquiry is whether the complainant established by a preponderance of the evidence that the reason for his discharge was his protected activity. *Roberts v. Durbin Marshall Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-035, slip op. at 15-16 (ARB Aug. 6, 2004) (citations omitted). Thus, in the absence of direct, "smoking gun" evidence of retaliation, a complainant must prove that respondent's proffered reasons for taking adverse action

[4] The STAA protects two categories of refusal to drive, commonly referred to as the "actual violation" and "reasonable apprehension" subsections. *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003). Protected activity under the STAA encompasses a refusal to drive in hazardous weather conditions, based on either the actual violation prong or the reasonable apprehension prong of Section 31105(a)(1)(B). Department of Transportation regulations prohibit the operation of a commercial vehicle in snow, ice, or sleet if the weather is sufficiently severe. 49 C.F.R. § 392.14 (2007). Under the STAA, the reasonable apprehension prong applies because weather conditions can make driving hazardous and thus render the condition of the vehicle unsafe. *See* 49 U.S.C.A. § 31105(a)(1)(B)(ii).

were a pretext for discrimination and that the employer intentionally discriminated against him because of his protected activity. *See Yellow Freight Sys.*, 27 F.3d at 1138 (adapting the *McDonnell-Douglas* burden-shifting framework to the STAA). "[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation . . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The ALJ's findings

The ALJ determined that Wainscott had demonstrated a prima facie case of discrimination - he engaged in protected activity in refusing to drive his truck on January 26, 2003, because of unsafe weather conditions; his employer, Pavco, was aware of Wainscott's action; and two days later Pavco terminated his employment, indisputably an adverse action. R. D. & O. at 16. The ALJ found that Pavco had produced a legitimate, non-discriminatory reason for its discharge of Wainscott, namely that he had violated company policies. *Id*. The ALJ then found that Wainscott failed to prove by a preponderance of the evidence that Pavco's reasons were pretext and that Pavco had fired him for engaging in protected activity. R. D. & O. at 17.

Substantial evidence supports the ALJ's findings that Wainscott engaged in protected activity by refusing to drive in unsafe conditions on January 26, and that Pavco knew of his action and fired him on January 28. Therefore, we accept these findings.

The ALJ determined that "the nature" of Wainscott's actions on the night of January 26, 2004 - leaving the HAZMAT trailer unattended and taking the tractor home - plus the events of the next two days, gave rise to his discharge, not his protected activity of refusing to drive in a dangerous ice storm. R. D. & O. at 17. The ALJ concluded that the reasons Pavco proffered for Wainscott's firing were "grounded in fact" and that he failed to prove they were a pretext for discrimination. R. D. & O. at 18.

Wainscott failed to prove pretext

Wainscott initially argues that Pavco's reasons for firing him - using the tractor without authorization and leaving the HAZMAT trailer in a lay-by - were not legitimate, non-discriminatory reasons because these actions constituted protected activity. Complainant's Brief at 7-9. We disagree. Substantial evidence supports a finding that Wainscott was not fired because he parked the trailer in the lay-by; he was fired for abandoning a HAZMAT vehicle, an action that directly violated company policy. Also, his inability to deliver the trailer to BASF by 7:00 a.m. on January 28 stemmed from another violation of company policy - personal use of the rented tractor. Neither violation of company policy constituted protected activity.

In addition, Wainscott contends that Pavco's reasons are pretext for three reasons. First, Wainscott had a clean driving record and no disciplinary warnings prior to his refusal to drive, yet after he engaged in protected activity, he was fired. Second, Pavco contradicted its own policy on personal use of tractors because the policy calls for fines, not firing. Third, Pavco did not show that it had ever fired anyone for a first offense of parking a BASF trailer or missing a deadline by one hour and 27 minutes; thus the firing was "markedly harsh" and constituted pretext. Complainant's Brief at 9-14.

Clean driving record

Noting his long-term, accident free-record, Wainscott essentially claims that the temporal proximity between his refusal to drive on January 26 and his discharge on January 28 demonstrates that Pavco fired him because of protected activity. Complainant's Brief at 9-10.

Although temporal proximity may constitute evidence of retaliatory animus, it is "just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-034, slip op. at 6 (ARB Mar. 30, 2001).

In this case, the ALJ concluded that Wainscott had established a prima facie case, which rested in part on the temporal proximity of his discharge to his refusal to drive. R. D. & O. at 16. But the inference of causation raised by a prima facie case is not dispositive. Wainscott's burden is not to prove temporal proximity between his protected activity and Pavco's adverse action, but to establish by a preponderance of the evidence that Pavco discriminated against him because of his protected activity. *See Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-039, slip op. at 8 (ARB June 29, 2007) (ALJ's failure to analyze the evidence in terms of complainant's burden renders his legal conclusions completely inadequate and requires remand). Therefore, we reject Wainscott's argument. *See Mason v. CB Concrete Co*. ARB No. 04-026, ALJ No. 2003-STA-021, slip op. at 5 (ARB Jan. 31, 2005) (temporal proximity found insufficient to establish a causal nexus between complainant's discharge and his protected activity).

Personal use of tractors

Wainscott testified that even after the leasing contract with Ryder, Pavco drivers were still taking their Ryder tractors home, as they sometimes did when Pavco owned its tractors. He added that he did not use the Ryder facility except when his tractor needed servicing. TR at 95, 119, 134, 141-42. The ALJ found that Wainscott knew he was prohibited from bringing home his tractor without prior permission because he had previously been fined for doing so. R. D. & O. at 17. The ALJ also found "consistent" the testimony of Pavco's witnesses that the tractors rented from Ryder were not for personal use. *Id*.

Regarding the use of company equipment, the Pavco manual states:

> No driver is allowed to take their unit home. **All Pavco Trucking Company tractors are to be parked at your home terminal – no exceptions. Use of Pavco equipment as a private conveyance will result in you being charged 80 cents per mile, or a minimum of $50.00 per occurrence.**

CX 8 at 8, 12.

Pavco's president, Terry Roy, testified that the company did not allow drivers to take their tractors home and did not "want it to happen." TR at 215. He stated that the policy had never changed, and noted an occasional exception if a driver had a load going past his house and wanted to stop for a couple of hours, but "definitely not" if the load was hazardous material. *Id*. Roy added that since Pavco had bought its predecessor, Coast Midwest, and signed its lease with Ryder in July 2003, the company rule was that drivers park their tractors and/or loads at Ryder's Anderson facility. TR at 221. Roy explained that he "basically trust[ed]" that his drivers would follow the rule and he would "take action" if he found out they were not. TR at 220-23, 240-43, 252.

Chairman James Roy, Terry Roy's father, testified that company policy never allowed drivers to take their tractors home. TR at 287-88. Roy stated that he knew some drivers flouted the rule, but he had fined at least four drivers for unauthorized use of tractors during 2004 and had fired one in December after the third offense. TR at 289, 317. He explained that the company's insurance policy prohibited the personal use of tractors by the drivers. TR at 288.

Substantial evidence supports the ALJ's findings that, contrary to Wainscott's uncorroborated testimony, Pavco drivers were not allowed to take the Ryder rented tractors home without permission. We therefore accept the ALJ's finding that Wainscott failed to prove that this reason for his discharge was pretext.

The unattended HAZMAT trailer

Wainscott claimed that Pavco knew that trailers were occasionally or sometimes dropped in the lay-by and that he was never told they could be dropped only at the Ryder facility or the BASF plant. TR at 109, 1145. The ALJ found "credible" the testimony of Pavco's dispatchers and James and Terry Roy that they and BASF were concerned and "upset" about the unattended HAZMAT trailer. R. D. & O. at 17. Both Roys explained that leaving the trailer's tanks unattended violated company policy as well as federal regulations issued by the Departments of Transportation and Homeland Security. TR at 227-29, 234, 240, 250, 312-14, 328-29.

James Roy, Pavco's chairman, testified that his primary concern was that the trailer was "sitting on the side of the road" and it's "not supposed to be there" and it's

"supposed to be attended at all times," and "a customer wanted it back." TR at 300-01. Keifer, BASF's plant manager, testified that in his 11 years of work, he had never seen or heard of a hazardous load parked alongside the road unattended, and when he heard about the BASF trailer early on January 27 and then saw it that evening, it was "a very big deal." TR at 28-33, 74, 372-79; RX 3.

In addition, the ALJ relied on Pavco's driver manual, which states that HAZMAT loads may be dropped[5] at only five places, including the BASF plant in Central, South Carolina, and the Ryder facility in Anderson. CX 8, R. D. & O. at 17. The manual adds that the driver must first obtain authorization from the dispatcher before dropping the HAZMAT load. CX 8. Also, a driver "must be in attendance . . . at all times while transporting" HAZMAT loads. *Id.* Because substantial evidence supports the ALJ's findings based on the Pavco manual and the testimony of the Roys and Kiefer, we conclude that Wainscott failed to prove pretext in this regard.

Wainscott's other arguments on appeal

On appeal, Wainscott argues that the ALJ erred in admitting the BASF bill of lading and the cylinder tank check-in control sheet, RX-4, on the grounds that these documents had not been previously disclosed, that no proper foundation had been laid because Keifer had no first-hand knowledge, and that the information was irrelevant and contradictory. Complainant's Brief at 15-17.

At the hearing, the ALJ overruled Wainscott's relevance objection, noting that the question of whether the trailer contained hazardous material had been discussed "ad nauseum," and evidence on that issue "comes as no surprise at this point." TR at 336-37. The ALJ added that the documents and Keifer's testimony were rebuttal evidence and "quite relevant" to Wainscott's testimony that the load was not hazardous because the tanks were empty, the pressure gauges at zero, and the valves open. TR at 366. After Wainscott's counsel had extensively questioned Keifer about the authenticity of the documents, TR at 344, 347-51, 3544-65, the ALJ overruled the hearsay objection. TR at 366.

DOL's STAA regulations specify that hearings will be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings. 29 C.F.R. § 1978.106(a). Under these rules, hearsay evidence is inadmissible. 29 C.F.R. § 18.802. We review de novo the ALJ's decision to admit or exclude evidence as hearsay for abuse of discretion. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 8 (ARB Apr. 28, 2006). To reverse an evidentiary ruling, we must conclude

[5] "Dropping a load" means unhooking the tractor truck from the flatbed trailer and pulling down the support struts. The manual warns drivers against dropping loads on asphalt or dirt surfaces, which may not be strong enough to support the weight. CX 8 at 7. Pavco's flatbed trailers are specially fitted with steel bracing to carry up to six tanks at a time, which, when fully loaded, weigh about 5,000 pounds each. TR at 294.

that the ALJ abused his discretion and that the error was prejudicial. *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003); *cf. Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-015, slip op. at 5 (ARB Aug. 1, 2002).

The ALJ properly ruled that Keifer established a foundation for admission of the two documents. *See* 29 C.F.R. § 18.602 (A witness may not testify to a matter unless sufficient evidence supports a finding that the witness has personal knowledge of the matter. Such evidence may consist of the witness's own testimony).

Keifer explained that as operations manager, he was responsible for actions based on the information contained on the cylinder check-in sheet - credits to customers for the amount of product remaining in the tanks - and that these sheets were maintained on a daily basis as BASF's business records. TR at 344-50. Inasmuch as Keifer identified and described the two documents and was in charge of them, he was qualified to establish the foundation for their admission. *See* 29 C.F.R. §18.803(6) (excepting records maintained "in the course of a regularly conducted business activity" from the general rule against admission of hearsay evidence.).

The ALJ also properly ruled that the BASF documents were relevant. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401.

Wainscott testified that the tanks he dropped alongside the road no longer contained hazardous material. TR at 124, 146. Therefore, he was not violating either Pavco's HAZMAT policy or any federal standards. Keifer's detailed explanation of the shipping process and his certainty that at least one of the tanks that came back from Bude, Missouri, was pressurized and contained about 900 pounds of product directly contradicted Wainscott's testimony. TR at 356. As Keifer explained, the bill of lading showed that two tanks came back on the flatbed Wainscott delivered to BASF on January 28, and that at least one of the tanks was not empty. TR at 357. Therefore, evidence that the load was still HAZMAT was relevant.

Finally, Wainscott argues that the ALJ erred in ruling that BASF[6] was not covered by the STAA and in not finding that IPS violated the STAA because it failed to produce evidence to rebut the prima facie case. Complainant's Brief at 3-7. Neither of these arguments is persuasive. Even if IPS was a joint employer as the ALJ found, IPS took no adverse action against Wainscott. Pavco terminated his employment, and informed IPS to stop paying him wages. BASF contracted with Pavco to deliver the tanks, but had no

[6] The ALJ found that Wainscott failed to establish that BASF exercised sufficient employer control over him to bring the company within STAA coverage. R. D. & O. at 15. While BASF was an important customer of Pavco's, it had no supervisory or direct authority over Wainscott, and did not participate in Pavco's decision to terminate his employment. *Id*. The record testimony supports the ALJ's findings and therefore we accept them.

employer-employee relationship with Wainscott. The record is clear that Pavco hired and fired Wainscott and directed his work and that BASF had "no control" over Wainscott. TR at 52. Therefore, we reject these arguments.

CONCLUSION

Substantial evidence supports the ALJ's finding that Wainscott did not prove by a preponderance of the evidence, as he must, that Pavco terminated his employment because he refused to drive on January 26, 2004, due to adverse weather conditions. The record does not support Wainscott's theories that Pavco's reasons for firing him were pretext. We therefore affirm the ALJ's Recommended Decision and Order and **DENY** Wainscot's complaint.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge