



**In the Matter of:**

**MARK N. SAFLEY,**

**ARB CASE NO. 05-113**

**COMPLAINANT,**

**ALJ CASE NO. 2003-STA-54**

**v.**

**DATE: September 30, 2005**

**STANNARDS, INC., d/b/a  
STANNARD MOVING & STORAGE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER**

This case arises from a complaint Mark N. Safley filed alleging that his employer, Stannards, Incorporated, violated the employee protection (whistleblower) provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), when it terminated his employment. On June 21, 2005, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he determined that Safley had not engaged in activity protected nor was he subjected to discrimination under the STAA and, therefore, he denied the complaint. Neither of the parties have filed briefs with the Board, either in support of or in opposition to the ALJ's R. D. & O. pursuant to 29 C.F.R. § 1978.109(c)(2) (2005). We affirm that Safley did not engage in protected activity nor was he subjected to discrimination, under the STAA. Thus, we affirm the ALJ's R. D. & O. and deny Safley's complaint.

## BACKGROUND

We summarize the ALJ's findings of facts. Stannards, Incorporated, employed Safley as a driver in 2003.<sup>1</sup> Hearing Transcript (HT) at 64, 157. Safley sustained a back injury on March 14, 2003. HT at 124, 209-210. He subsequently saw a physician on March 17, who imposed work restrictions on Safley to lift no more than 20 pounds, but did not restrict him from driving. *See* Complainant's Exhibits (CE) 1-25, 5-2, 6-2. The physician also prescribed medication for Safley's condition and warned him that it had possible sedative side effects.

On March 20, 2003, Safley's boss, Randy Stannard, asked Safley to drive a truck to Minnesota. HT at 78, 215, 219. Safley informed Stannard that he had been prescribed medication that had possible sedative side effects. HT at 28, 38, 220. After indicating that he had not taken the medication that day, was not experiencing any side effects and could complete the drive, Safley drove the truck to Minnesota. HT at 29, 38, 41, 162, 220-221.

On May 8, 2003, Safley drove a truck loaded with furniture to Cedar Rapids, Iowa. HT at 191. After completing the drive, Safley contacted the Stannards office to inform them that he was unable to help unload the furniture from the truck due to his back condition. HT at 102, 138, 191. Ultimately, on May 19, 2003, Safley's employment was terminated for insubordination, including making threats and arguing with Stannards managers. HT at 227; CE 1-17.

Safley filed his complaint later that same day on May 19, 2003. CE 1-4. After an initial investigation, the Regional Supervisor of the Occupational Safety and Health Administration dismissed Safley's complaint on July 31, 2003. CE 1-1-3. Safley appealed and the case was forwarded to the Office of Administrative Law Judges for a hearing. Before the ALJ, Safley contended that he engaged in protected activity when he confronted Stannards management about driving under the influence of sedative medication on March 20, 2003, and when he was fired after being unable to complete his work assignment on May 8, 2003, because it violated his work restrictions. After a hearing, the ALJ issued his R. D. & O., in which he determined that Safley had not engaged in activity protected, nor was Safley subjected to discrimination, under the STAA and, therefore, he denied the complaint.

## ISSUES

1. Did Safley prove by a preponderance of the evidence that he engaged in protected activity under the STAA?

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<sup>1</sup> The ALJ also properly noted that the parties stipulated that Stannards, Incorporated, is an employer subject to the STAA and that Safley was an employee of Stannards. R. D. & O. at 3.

2. Did Safley prove by a preponderance of the evidence that Stannards violated the STAA by taking adverse action against him for engaging in such protected activity?

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).<sup>2</sup> Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which 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 Env'tl. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389401 (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).

In reviewing the ALJ's conclusions of law, the Board, 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 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *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).

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<sup>2</sup> This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

## REQUIREMENTS OF THE STAA

The STAA provides in pertinent part:

Prohibitions - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because –

(A) The employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because –

(i) the operation violates a regulation, standard, or order of the United States related to the 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.

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

49 U.S.C.A. § 31105.

## DISCUSSION

### Legal Framework

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity, 2) his employer was aware of the protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean*

*Harbors Envt'l. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987). The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

As we explained in *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ Nos. 03-STA-1, 03-STA-2, slip op. at 4-5 (ARB Oct. 27, 2004) and *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004), in STAA cases the Board adopts the burdens of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr.*, 509 U.S. at 513; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002). Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated the STAA.

Only if the complainant makes this prima facie showing does the burden shift to the employer respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Densieski*, slip op. at 4; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002); *Poll*, slip op. at 5.

Although we have said that the focus in a case tried on the merits should be on a complainant's ultimate burden of proof rather than the shifting burdens of going forward with the evidence, see *Feltner*, slip op. at 5; *Densieski*, slip op. at 5; *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 99-CAA-15 (ARB May 20, 2003), it appears in this case that the ALJ has erroneously equated Safley's threshold burden of adducing evidence to establish a prima facie case with his ultimate burden of proof. The ALJ misstated a STAA complainant's prima facie burden when he wrote that, in establishing a prima facie case, the complainant must "prove" protected activity, knowledge, adverse action, and causation. R. D. & O. at 17, 25. The weighing of evidence like this is normally reserved for whether the complainant preponderated with the evidence, not whether he established a prima facie case. Instead, at the evidentiary

hearing the complainant initially must merely adduce some evidence as to each of these elements. *See Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5-6 (ARB Sept. 30, 2004).

However, the ALJ correctly placed the ultimate burden of proof on Safley and held that he did not prove that he engaged in protected activity under the STAA. R. D. & O. at 18-22. Perhaps the ALJ's error is merely one of nomenclature, i.e., terming the ultimate elements of proof the "prima facie" case. Nevertheless, because of the potential for confusion we have described, we review the record, deferring to the ALJ's factual findings as supported by substantial evidence.

### **Safley did not engage in protected activity under the STAA.**

There is no allegation or evidence that Safley made any covered safety complaint or that he initiated, or was involved with, any safety-related proceeding. 49 U.S.C.A. § 31105(1)(A). The ALJ also determined that the record did not demonstrate that the operation of Safley's truck either on March 20, 2003, or May 8, 2003, violated a motor carrier safety law or regulation or that Safley had a reasonable apprehension based on any unsafe condition regarding the truck itself or his ability to drive the truck. 49 U.S.C.A. § 31105(1)(B)(i)-(ii), (2); R. D. & O. at 18-22. Thus, the ALJ concluded that Safley's allegations were not protected activity under the STAA. The ALJ's R. D. & O. thoroughly and fairly recites the relevant facts underlying this dispute. In addition, we defer to the ALJ's demeanor-based credibility findings.<sup>3</sup>

Safley contended that he engaged in protected activity when he confronted Stannards management about driving under the influence of sedative medication on March 20, 2003. Although Safley had been prescribed medication, his physician had not imposed any driving restrictions on Safley, nor did Safley indicate to Stannards management that he was under any such driving restrictions. *See* Hearing Transcript (HT) at 162, 220; CE 1-25, 5-2, 6-2. Moreover, Safley indicated to Stannards management that he had not taken any potential sedative medication that day and was not

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<sup>3</sup> The ALJ found all of the witnesses' testimony credible except for portions of Safley's testimony that were contradicted by other evidence in the record. R. D. & O. at 6-8. In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The ARB defers to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

experiencing any such side effects. *See* HT at 29, 38, 162, 220-221. Finally, Safley indicated that he could safely complete the drive he was assigned that day without taking any medication, *see* HT 29, 41, 221, and he did in fact safely complete the drive. Thus, we affirm the ALJ's conclusion that the record does not demonstrate that the operation of Safley's truck that day violated a motor vehicle safety regulation based on his inability to drive the truck, *see* 49 U.S.C.A. § 31105(1)(B)(i); 49 C.F.R. §§ 392.3, 392.4 (2004), or that Safley had a reasonable apprehension of serious injury because of his truck's unsafe condition or his ability to drive the truck, *see* 49 U.S.C.A. § 31105(1)(B)(ii), (2), as supported by substantial evidence. Consequently, we affirm the ALJ's finding that Safley did not engage in protected activity under 49 U.S.C.A. § 31105(1)(B)(i)-(ii), (2), when he confronted Stannards management about potentially driving under the influence of sedative medication on March 20, 2003.

Safley also contended that he engaged in protected activity when he was unable to complete his work assignment on May 8, 2003, because Stannards management's assignment violated his work restrictions to lift no more than 20 pounds. However, Safley testified that he had no complaint about driving his truck that day and that he was no longer taking any potential sedative medication, but his only complaint concerned his inability to unload the furniture from the truck due to his back condition. *See* HT 138. Thus, we affirm the ALJ's conclusion that that the record does not demonstrate that Safley's work assignment on May 8, 2003, involved any violation of a motor vehicle safety regulation, *see* 49 U.S.C.A. § 31105(1)(B)(i), or that Safley had a reasonable apprehension of serious injury because of any unsafe condition regarding the truck itself or his ability to drive the truck, *see* 49 U.S.C.A. § 31105(1)(B)(ii), (2), as supported by substantial evidence. Consequently, we affirm the ALJ's finding that Safley did not engage in protected activity under 49 U.S.C.A. § 31105(1)(B)(i)-(ii), (2), when he was unable to complete Stannards management's work assignment on May 8, 2003.

### **Safley was not subjected to discrimination under the STAA.**

Even if, assuming *arguendo*, Safley had established protected activity, the ALJ properly found that Safley also did not prove discrimination against Stannards. The ALJ accurately viewed Safley's termination on May 19, 2003, as an adverse action. R. D. & O. at 22. Although Safley was subjected to an adverse action, however, the ALJ's finding that Stannards had legitimate, nondiscriminatory reasons for terminating Safley is supported by substantial evidence.

Initially, Safley argued that Stannards terminated his employment because of his injury, lifting restrictions and inability to perform his driving assignments. Contrary to Safley's characterization, the ALJ accurately found that Safley was not restricted from driving, was not required to lift when driving, did not drive when taking any medication that could impair his driving and stated that he could, and in fact did, drive his truck. Thus, as the ALJ noted, there is no connection between Safley's injury or lifting restrictions and driving a truck or the commercial motor vehicle safety regulations. R. D. & O. at 22-23. Consequently, even if Stannards terminated Safley's employment because

of his back condition, which Stannards denies, that would not be a reason the STAA prohibits.

Next, the ALJ properly determined that Stannards articulated legitimate, nondiscriminatory reasons for terminating Safley's employment due to insubordination, including making threats and arguing with Stannards managers. R. D. & O. at 23; HT at 227; CE 1-17. And substantial evidence supports the ALJ's finding that Safley failed to establish that Stannards's stated reasons for his termination were pretextual. Although Safley contended that Stannards terminated his employment for confronting Stannards management about driving under the influence of sedative medication in March 2003, the ALJ accurately noted that his termination did not occur until two months later. R. D. & O. at 25. Similarly, while Safley contended Stannards terminated his employment because he was unable to complete his work assignments due to his lifting restrictions, there is, as the ALJ noted, no connection between Safley's lifting restrictions and driving a truck that would implicate the commercial motor vehicle safety regulations. So any inability to work due to his lifting restrictions would not be protected activity under the STAA. Consequently, we affirm the ALJ's finding that Safley failed to establish that Stannards engaged in unlawful discrimination under the STAA as supported by substantial evidence.

#### **CONCLUSION**

Thus, we affirm the ALJ's recommended decision because there is substantial evidence to support the ALJ's findings of fact and his determination that Safley did not engage in protected activity under the STAA and was not subjected to discrimination in violation of the STAA. Accordingly, we **DENY** Safley's complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**