In the Matter of:

PAUL WALKEWICZ, **ARB CASE NO. 07-001**

COMPLAINANT, **ALJ CASE NO. 2006-STA-030**

v. **DATE: May 30, 2008**

L & W STONE CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
Gary D. Babbitt, Esq., *Hawley Troxell Ennis & Hawley, LLP,* Boise, Idaho

FINAL DECISION AND ORDER

Paul Walkewicz filed a complaint with the United States Department of Labor alleging that his former employer, L&W Stone Corp., constructively discharged him because he refused to drive a commercial motor vehicle when to do so would have violated a motor vehicle safety regulation. This action, he claims, violated the employee protection section of the Surface Transportation Assistance Act (STAA).[1] After an

[1] 49 U.S.C.A. § 31105 (West 2008). Regulations that implement the STAA are found at 29 C.F.R. Part 1978 (2007). Congress has amended the STAA since Walkewicz filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary for us to determine whether the amendments are applicable to this case because even if they were, they would not affect our decision since they are not applicable to the issues presented for our review.

evidentiary hearing, a Department of Labor Administrative Law Judge (ALJ) denied Walkewicz's complaint.[2] This case is before this Board pursuant to the STAA's automatic review provisions.[3] We are bound by the ALJ's findings of fact if those findings are supported by substantial evidence on the record considered as a whole.[4] For the following reasons, we accept the ALJ's recommended decision and deny Walkewicz's complaint.

BACKGROUND

The relevant facts are for the most part uncontested. L&W produces and sells decorative and building stone products. Walkewicz delivered truckloads of the stone products to customers out of L&W's Orland, California distribution center.

On December 19, 2005, Walkewicz began his shift at midnight and delivered his shipment. At 3:00 p.m., on his return to Orland, he pulled over several miles from the yard. He called his supervisor, Jonathon Danley, L&W's trucking and maintenance manager for the Orland depot. He told Danley that he had "broken down" and could not drive the truck back to the yard because he was "out of hours." Danley drove from the depot to fix the truck. Apparently the truck had run out of gas, and Danley was able to get the truck to run. Danley told Walkewicz to drive the truck back to the yard. He said that Walkewicz would not violate the maximum hours rule because an exception to that rule exists in case of an emergency.[5]

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[2] Recommended Decision and Order (R. D. & O.), *Walkewicz v. L&W Stone Corp.*, 2006-STA-030 (ALJ Sept. 20, 2006).

[3] "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." 29 C.F.R. § 1978.109(a). The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978.

[4] 29 C.F.R. § 1978.109(c)(3). The Board reviews questions of law de novo. *See Yellow Freight Sys., Inc. v. Reich,* 8 F.3d 980, 986 (4th Cir. 1993).

[5] Walkewicz had been on duty for 15 hours on December 19, 2005. The applicable Federal Motor Carrier Safety Administration rule provides that "[n]o motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle . . . [f]or any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty . . . . 49 C.F.R. § 395.3 (a)(2) (2005).

Walkewicz refused to drive but called his wife, who worked for the California Department of Motor Vehicles. He asked her to verify the exception that Danley had mentioned. She in turn called a highway patrol officer who informed her that no such exception existed. She then called Danley and informed him what she had learned. And Danley confirmed that no exception existed when he called a nearby highway patrol weigh station. Nevertheless, according to Walkewicz, Danley again told him to drive the truck to the depot, and he again refused.

Walkewicz then called Benjamin Pressley, L&W's Chief Operations Officer, and asked him to come out and pick him up. Pressley arrived with another driver who took the truck to the depot. Pressley drove Walkewicz back.

Two days later, Walkewicz received a bonus check and Danley granted him two leave requests. But between the December 19th incident and January 6, 2006, the day Walkewicz filed his STAA complaint, he was given only three driving assignments, fewer than any of the other Orland drivers who were not on vacation during that period.[6] Thus, Walkewicz's STAA complaint alleged that when L&W reduced his assignments, and therefore his income, because he refused to drive on December 19th, it constructively discharged him. The parties stipulated that L&W's business decreases in the winter, and Walkewicz admits that business was slow between Christmas 2005 through the first week of January 2006.[7] On February 8, 2006, Walkewicz notified Danley, in writing, that due to his infrequent assignments and the fact that a former employer had hired him, he was resigning.[8]

DISCUSSION

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 protected activities are making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" "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."[9]

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6 Respondent's Exhibit (RX) 12.

7 R. D. & O. at 2; Transcript (TR) 80.

8 RX 15.

9 49 U.S.C.A. § 31105 (a).

To prevail on his STAA claim, Walkewicz must prove by a preponderance of the evidence that he engaged in protected activity, that L&W was aware of the protected activity, that L&W discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. If Walkewicz does not prove one of these requisite elements, his entire claim fails.[10]

Protected Activity, Knowledge, and Adverse Action

The ALJ found that Walkewicz engaged in protected activity when he told Danley on December 19, 2005, that he would not drive the truck because he was "out of hours."[11] This action falls within the clause, just noted, that protects an employee who refuses to drive when to do so would violate a motor vehicle safety or health regulation, standard, or order.[12] To be protected under this provision, a driver must prove that an actual violation of a regulation, standard, or order would have occurred.[13] The parties do not contest the fact that on December 19th Walkewicz had been on duty for more than 14 hours (and was therefore "out of hours") and that he refused to drive. Therefore, substantial evidence supports the ALJ's finding that Walkewicz engaged in protected activity and L&W's Danley knew about it.

As already noted, Walkewicz alleged that when L&W reduced his driving assignments after December 19th, the company constructively discharged him. The ALJ found that Walkewicz presented "no evidence, except his reduced hours yielding less pay, that his work place was so unpleasant that a reasonable person would have felt compelled to resign."[14] Given the facts of this case, the record supports a finding that L&W did not constructively discharge Walkewicz.[15] Nevertheless, as the ALJ found and the record demonstrates, when L&W sent Walkewicz out on fewer deliveries between December 19th and January 6th (when he filed his STAA complaint), Walkewicz

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[10] *See 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).

[11] R. D. & O. at 6.

[12] 49 U.S.C.A. § 31105(a)(1)(B)(i).

[13] *See Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 10 (ARB Oct. 31, 2007).

[14] R. D. & O. at 6 n.7.

[15] *See Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SDW-001, slip op. at 7-8 (ARB July 30, 1999) (proving constructive discharge requires a showing that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign) (citing *Bristow v. Daily Press*, 770 F.2d 1252, 1255 (4th Cir. 1985)).

suffered a loss of pay, thus an adverse action. Therefore, to prevail, Walkewicz must prove by a preponderance of the evidence that L&W reduced his assignments because of his refusal to drive on December 19th.

L&W Did Not Retaliate

The record supports the ALJ's finding that Walkewicz did not prove that L&W discriminated, that is, reduced his work because of his protected refusal to drive. Rather, the evidence indicates that because of the seasonal decrease in business in December and the beginning of January, L&W had fewer assignments to give to the five drivers, including Walkewicz, who were available to drive during that period.[16] While the record shows that Walkewicz received only three assignments compared to the four other drivers, who received nine, eight, seven, and three assignments during this period,[17] L&W presented evidence that Walkewicz worked less because he was not as dependable as the others.

Each L&W driver drove a different type and size of truck. For instance, Walkewicz drove a large truck, one that was best suited for larger loads but not best for customers with limited turn space.[18] Thus, according to Danley, the first criterion for assigning a job was the type of truck needed. The next consideration was driver dependability. For Danley, dependable drivers get the loads delivered on time, promptly return the trucks to the yard for servicing, take the loads to all necessary destinations, do not receive preventable traffic citations, do not threaten to abandon a load if a problem arises, thoroughly clean their trucks, and receive few or no customer complaints.[19]

L&W presented evidence that it assigned Walkewicz fewer loads because he was less dependable than the other drivers. Namely, in September 2005 L&W's Chief Executive Officer Scott Laine observed Walkewicz driving too fast, and on the same day, Walkewicz was cited because his truck's license plate was covered.[20] Furthermore, in October 2005 Walkewicz told Danley that he was going to phone his wife and have her come pick him up because of a problem with the load he was carrying.[21] Also, he had

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[16] Two other drivers were on vacation or FMLA leave from December 19 through January 6. *See* RX 12.

[17] RX 12. The other driver who was assigned only three loads was having difficulty getting to work early because of transportation problems. TR 83.

[18] TR 165.

[19] RX 11.

[20] RX 6, 7.

[21] RX 8.

run out of gas on December 19 and on a previous date.[22] Plus, "about 80% of the time" he had not promptly returned his truck to the yard for servicing.[23]

If Walkewicz could prove by a preponderance of the evidence that his lack of dependability was not the true reason why L&W did not assign him more work, but instead was a pretext for retaliation, we could infer that L&W assigned him so few loads because of his protected refusal to drive on December 19.[24] But Walkewicz did not adduce evidence that he was dependable compared to the other drivers. Moreover, as the ALJ notes, the fact that L&W gave Walkewicz a bonus and granted his vacation requests on December 21, two days after his protected refusal to drive, tends to indicate that the company was not retaliating because of that refusal to drive.

In short, substantial evidence in the record as a whole supports the ALJ's finding that Walkewicz did not prove by a preponderance of evidence, as he must, that L&W retaliated because of protected activity. Therefore, we accept the ALJ's recommendation and **DENY** Walkewicz's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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22 TR 157-161.

23 RX 10.

24 *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).