In the Matter of:

NORMAN BARNETT, **ARB CASE NO. 07-053**

COMPLAINANT, **ALJ CASE NO. 2006-STA-038**

v. **DATE: September 22, 2008**

LATTIMORE MATERIALS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Steve Kardell, Esq., *Clouse, Dunn & Hirsch*, LLP, Dallas, Texas

For the Respondent:
R. Scott Anderson, Esq., *Anderson, Jones PLLC*, Dallas, Texas

FINAL DECISION AND ORDER

Norman Barnett complains that Lattimore Materials, Inc. violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 2008),[1] and its implementing regulations, 29 C.F.R. Part 1978 (2007), when it discharged him for refusing to drive a truck he claimed

[1] The STAA has been amended since Barnett filed his complaint. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide whether the amendments apply to this case because even if they do apply, they would not affect our decision.

was unsafe. An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on February 13, 2007, granting summary decision (judgment) for Lattimore on the ground that the truck was not unsafe and his refusal to drive was unreasonable. We affirm.

BACKGROUND

The following undisputed facts appear in the record. Barnett was operating a Lattimore ready mix concrete truck (unit 834) on February 8, 2006, when he was involved in an accident. The investigation revealed that Barnett's excessive speed caused the accident. Barnett did not complain of faulty brakes at the scene, continued to drive the truck, and filled out truck condition forms that said the brakes were operational. Affidavit of Patrick Garrett in Support of Motion for Summary Decision; Affidavit of Bruce Queen. Lattimore gave Barnett a two-day suspension (February 9-10) for being involved in a preventable accident. Lattimore Answer to Complaint.

Following the accident, Mike Gonzales, a Lattimore mechanic, checked the brakes, then loaded the truck and tested the brakes. They were fine. Affidavit of Mike Gonzales. Lattimore's production supervisor, Bruce Queen, also tested a fully loaded truck and the brakes worked properly. He described the testing that had been done on the truck to Barnett. Affidavit of Bruce Queen. Another driver, Allen Rowan, drove the truck from February 9 through February 14. Initially he thought the braking was sluggish, but after adjustment and testing, he agreed they were fine. Affidavits of Allen Rowan, Bruce Queen, and Mike Gonzales.

On February 16, Barnett reported for work and Jason Lang assigned the truck to him to drive. Lang told him the truck had been checked and was safe. Without inspecting or test driving the truck, Barnett refused to drive it due to an unspecified brake defect. Lang sent him home. Affidavit of Jason Lang. Lattimore discharged Barnett the next day for insubordination.

Barnett filed a whistleblower complaint with the Department of Labor Occupational Safety and Health Administration (OSHA), which OSHA denied on May 29, following an investigation. Barnett then requested an ALJ hearing. Lattimore filed a motion for summary decision with supporting affidavits. Barnett filed a reply without affidavits. The ALJ issued an R. D. & O. in Lattimore's favor.

DISCUSSION

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).

We review an ALJ's recommended grant of summary decision de novo. *King v. BP Prods. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008). Under 29 C.F.R. § 18.40(d), "[t]he administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Moreover, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading." *Id*. at § 18.40(c).

To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007); *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No.2003-STA-030, 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). If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail. *Cf. Forrest*, slip op. at 4.

The employee activities the STAA protects 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).

The STAA protects two categories of work refusal, commonly referred to as the "actual violation" and "reasonable apprehension" subsections. Barnett brought his complaint under the "reasonable apprehension" subsection. Complaint at 2-3. Under that subsection,

> [A]n 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(a)(2).

A complainant must not only prove that he had an apprehension of serious injury due to his truck's unsafe condition, but he must also show that a reasonable person in his position would have concluded that the condition of the truck was a real danger to himself or the public. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095; ALJ No. 2002-STA-035, slip op. at 14 (ARB Aug. 6, 2004). In other words, the reasonable apprehension provision requires that the complainant's apprehension be objectively reasonable based on the information available to the employee at the time of the refusal. *Id.* Refusing to operate a truck because the driver believed the brakes were unsafe would be protected activity under the STAA if the driver's belief was reasonable. *See* 49 C.F.R. § 392.7 (prohibiting commercial motor vehicle from being driven unless driver is satisfied that parts and accessories, including service brakes, are in good working order); *Roberts*, slip op. at 13; *Jackson v. Protein Express*, ARB Nos. 96-194, ALJ No. 1995-STA-038, slip op. at 3 (ARB Jan. 9, 1997).

It is not disputed that Barnett was an employee and Lattimore was an employer covered under the STAA. But Barnett's refusal to drive truck unit 834 on February 16 did not meet his protected activity requirement under the STAA, since he could not have reasonably believed the truck was unsafe because of defective brakes. At the time of his February 8 accident, Barnett did not complain that the truck had defective brakes and he continued to drive it. Lattimore's mechanic (Gonzales) checked and adjusted the brakes, loaded the truck, and test drove it. The production supervisor (Queen) also test drove the truck when it was loaded and the brakes worked properly. He described the testing that had been done on the truck to Barnett. The other driver (Rowan) drove the truck from February 9 through February 14, had the brakes adjusted, and drove it safely.

On February 16, Lang assigned the truck to Barnett, and told him it had been checked and was safe. Without inspecting or test driving the truck, Barnett refused to drive it. Under these undisputed facts, we conclude that Barnett did not have an objectively reasonable belief that the truck was unsafe to drive due to defective brakes.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's R. D. & O. granting summary judgment in favor of Lattimore, and **DENY** Barnett's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge