



In the Matter of:

WILLIAM S. FARRAR,

ARB CASE NO. 08-015

COMPLAINANT,

ALJ CASE NO. 2005-STA-046

v.

DATE: September 15, 2009

ROADWAY EXPRESS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William S. Farrar, *pro se*, Hahira, Georgia

For the Respondent:

Carl H. Gluek, Esq., *Frantz Ward LLP*, Cleveland, Ohio

FINAL DECISION AND ORDER

The Complainant, William Farrar, filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Respondent, Roadway Express, violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA)¹ and its implementing regulations² when,

¹ 49 U.S.C.A. § 31105 (West 2007). The STAA has been amended since Farrar 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 did apply, they would not affect our decision.

in retaliation for filing prior STAA complaints against Roadway, “Roadway agents ... presented false information and other misleading statements at the grievance panel hearings on October 26, 2004.”³ Upon remand a Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Farrar failed to prove that Roadway made any false or misleading representations to the grievance panel in retaliation for protected activity.⁴ Accordingly, the ALJ recommended that Farrar’s STAA complaint be dismissed.⁵ Upon review, finding that the ALJ’s decision is supported by substantial evidence and is in accordance with law, we accept the ALJ’s recommendation and deny Farrar’s complaint.

BACKGROUND

William Farrar drove trucks for Roadway Express for almost thirteen years before Roadway terminated his employment in August 2004.⁶ Prior to filing the complaint that initiated his current case against Roadway, Farrar filed two other STAA complaints against Roadway. In late October 2000, Farrar filed a complaint alleging that Roadway retaliated against him in violation of the STAA when it issued him a warning letter for delay of freight because Farrar made an unscheduled stop during a road assignment. Farrar claimed that he stopped because he could not drive safely when heavy fog obscured visibility.⁷

Farrar stated that after filing his first complaint in 2000, a Department of Labor investigator advised him that, regardless of the case’s outcome, he should document any incidents that were out of the ordinary or did not seem normal compared to other employees and that could be construed as discriminatory, because when employees bring STAA complainants against companies, the companies “historically” would try to find

² 29 C.F.R. Part 1978 (2006).

³ *Farrar v. Roadway Express*, ARB No. 06-003, ALJ No. 2005-STA-046, slip op. at 1 (ARB Apr. 25, 2007) (quoting Farrar’s Objections to OSHA Findings at 1 (June 14, 2005)(*Farrar I*)).

⁴ Recommended Decision and Order on Remand Dismissing Complaint (R. D. & O. on Rem.) at 21.

⁵ *Id.* at 24.

⁶ Respondent’s Exhibit (R. X.) 8 at 12.

⁷ R. D. & O. on Rem. at 9. A Department of Labor Administrative Law Judge dismissed this complaint when Farrar failed to appear for a scheduled hearing, and the Administrative Review Board upheld the Judge’s decision. *See Farrar v. Roadway Express*, ARB No. 03-031, 2001-STA-058 (ARB Mar. 30, 2004).

reasons to discharge the employees, whether legitimate or not.⁸ Farrar followed the investigator's suggestion that he keep a diary of such incidents.⁹ In the diary, Farrar recorded at least forty retaliatory actions that he alleged Roadway and its agents, primarily, manager Michael Doss, Farrar's supervisor, took against him following his initial STAA complaint.¹⁰ One of the incidents included in the diary was Roadway's termination of Farrar's employment because he was involved in an accident with a Roadway truck in 2002. After Farrar successfully contested the traffic citation, Roadway reinstated him.¹¹

On August 1, 2004, Farrar was involved in a serious accident while driving a rig for Roadway from Valdosta, Georgia to Lakeland Florida.¹² Roadway relieved Farrar of duty pending an investigation of the accident and issued a notice of discharge to him on August 7, 2004, informing him that his employment was terminated effective August 1, 2004.¹³ Following the termination of his employment, Farrar filed a grievance with the International Brotherhood of Teamsters, Local 528, citing improper discharge under Article 45 of the Teamster's National Master Freight Agreement (NMFA).¹⁴

1. Grievance proceedings

A grievance committee consisting of a two-member Union Committee and a two-member Employer Committee heard Farrar's grievance on October 26, 2004.¹⁵ Farrar grieved his discharge on the grounds that the August 1, 2004 accident, for which he was discharged, was unavoidable and the discharge letter was "improper, unwarranted, and not factual."¹⁶

⁸ R. D. & O. on Rem. at 5.

⁹ *Id.*

¹⁰ *Id.* at 9. In particular, Farrar stated that Doss had told him in 2001 that he was going to fire Farrar "one way or another because of my position,' 'which was the chief job steward'" *Id.* at 5.

¹¹ *Id.* at 9.

¹² R. X. 8 at 3.

¹³ R. D. & O. on Rem. at 3.

¹⁴ General Teamsters Local 528 Claim # 528-04-130.

¹⁵ R. D. & O. on Rem. at 10; R. X. 7 at 1.

¹⁶ R. X. 3 at 2.

At the discharge hearing, Edward Williams, a Roadway labor relations manager, represented the Respondent¹⁷ and Bill Tomlinson, a local union business agent, represented Farrar.¹⁸ Williams presented the case for Roadway arguing:

[W]hile en route to Lakeland, Florida, on 8/1/04, at approximately 05:30 a.m., Mr. Farrar lost control of tractor 804090 and trailer 902138, ran off the highway and overturned the units. The accident resulted in both the tractor and trailer being scrapped, release of hazard[ous] materials into the environment and serious damage to our customer's freight. Mr. Farrar was discharged for this serious preventable accident. Mr. Farrar claims in his statement that he was ran [sic] off the road by a second (2nd) vehicle. Unfortunately, there's nothing to substantiate this claim other than Mr. Farrar's statement. . . . Mr. Farrar never mentions applying brakes, flashing headlights, or anything else to avoid this second (2nd) vehicle other than running off the highway.^[19]

Williams went on to explain how the accident scene photographs supported Roadway's version of the accident:

The photos of the accident scene also conflict with [Farrar's] statement. He says that [the] right wheels dropped off the pavement, trailer started to slip sideways to the right. The photos clearly show no indication of any type of braking action on his part. Note the flat terrain of the shoulder and grass. Farrar traveled two hundred and forty-three (243) feet in a straight line. Given the flat terrain, Farrar could have stopped the unit on the grass, had he applied the brakes. With no braking action on his part, the unit flipped over into the ditch when the shoulder ran out. It is . . . obvious from the photos that Mr. Farrar had allowed himself to go to sleep.^[20]

Williams discussed the cost of the accident:

¹⁷ Hearing Transcript (Tr.) at 125, 132.

¹⁸ Tr. at 12.

¹⁹ R. X. 8 at 3.

²⁰ *Id.*

[T]he tractor is a total loss that is approximately fifty thousand dollars (\$50,000.00). The trailer is a total loss at approximately fifteen thousand (\$15,000.00) and that is purely a guess on the potential loss on the freight, that was placed at two hundred thousand (\$200,000.00) by the manager. . . . Plus the wrecker service and hazardous material clean up liability, which is unknown.

Finally, he addressed Farrar's driving record:

Mr. Farrar is an unsafe driver who refuses to take responsibility for his actions. It is obvious that . . . he is a danger to the motoring public. Mr. Farrar simply went to sleep and ran off the highway. He was very fortunate that this repeat performance of his past history did not cost him or someone else their life [sic]. There's nothing other than his story to indicate there was [a] second (2nd) vehicle. In fact, the facts show just the opposite. Mr. Farrar went to sleep and ran off the road. . . .^[21]

Tomlinson summarized Farrar's account of the accident:

Bill was headed south and a vehicle approached him with what appeared to be his high beams on. Bill felt the vehicle was close [to] riding the centerline, - so he started easing to the right side of the road. When the vehicle got closer to him, he realized that [the] vehicle was actually straddl[ing] the centerline so he took evasive action. He attempted to steer the unit off the road to prevent a head-on collision and ultimately lost control of the vehicle. . . . As bad as the accident looks, Bill still did what his experience has taught him, yet could not save the vehicle.^[22]

In rebuttal to Williams's presentation of Roadway's case, Tomlinson argued that Roadway's investigation of the accident was inadequate given the accident's severity and pointed out that the Florida Traffic Crash Report form prepared by State Trooper Hill, who responded to the call, indicated that there had been no improper driving or action and incorporated Farrar's recitation of the events preceding the accident.²³ Tomlinson also emphasized that the trooper's accident report was not completed until August 17th,

²¹ *Id.*

²² R. X. 8 at 5.

²³ *Id.* at 7-9.

ten days after Roadway terminated Farrar's employment.²⁴ Furthermore, when Farrar first contacted the trooper concerning the availability of the report she told him that she was awaiting registration information that she had requested from Roadway, but had not yet received.²⁵

Tomlinson also attacked Roadway's argument that Farrar had fallen asleep at the wheel by pointing out that Farrar had had plenty of time off before the run and was well rested. He noted that Farrar is a veteran driver and was well acquainted with the federal motor carrier safety regulations and knew to pull to the side of the road "at the hint of drowsiness."²⁶ He stated that just 45 minutes prior to the accident, Farrar had stopped for a snack and a soda, so that there was "no justifiable reason the company should jump to the conclusion that they have."²⁷

Farrar was also given an opportunity to address the grievance committee. He acknowledged that he did not apply the brakes. He contended that the shoulder was not sufficiently long for him to stop on at the posted speed of 60 miles an hour and he decided to try to pull off onto the shoulder and then back onto the highway in an effort to avoid a head-on collision.²⁸ Williams rebutted this explanation arguing:

Mr. Tomlinson [Farrar's representative] stated on record that Highway 471 is straight as an arrow Yet, Mr. Farrar is contending that he had all this split [second] decision when this accident occurred because bright lights was [sic] coming at him. Everyone sitting in this room knows when you're driving down a road, straight as an arrow when you can see miles and miles, no hills and no curves, that you know when someone has got their high beam on.

[T]his is a one (1) vehicle, single vehicle accident. An adjuster was not assigned. Our insurance company felt that it was not necessary, so an adjuster was not assigned. Mr.

²⁴ *Id.* at 8.

²⁵ To facilitate the filing of the report, Farrar traveled at his own expense to Lakeland, to the lot where the wrecked rig was stored and retrieved the documents needed to complete the report. He then hand-delivered the reports to Trooper Hill, so that she could complete the report. *Id.* at 6.

²⁶ *Id.* at 9.

²⁷ *Id.*

²⁸ *Id.* at 10.

Farrar was the only driver involved, the only vehicle involved. There was not a post accident drug screen. One was not required by DOT. So, the company didn't perform one. Emphasis was placed on the crash report that was completed by the officer [T]here were no witnesses. The officer put in this report what Mr. Farrar said happened. That's all she had to go by to put in there. She didn't see it and there were no witnesses. Also . . . Mr. Farrar stated himself . . . that he didn't hit the brakes. . . . [S]imply put, Mr. Farrar . . . had this serious preventable accident. It's extremely costly to this company.^[29]

During the opportunity for questioning, one of the committee members asked Farrar why he had not slowed down earlier since he admitted that he had seen the car approaching him when it was two miles away. Farrar responded that although the road looked straight that actually there was an S-curve before the accident site and he could not tell how far up the road the vehicle was. He said that he flashed his beams at the approaching car and assumed that the approaching car would respond, but by the time he determined that the car had crossed the center line, slowing down was not the answer because the car was too close.³⁰

This committee member also requested Farrar to explain the trajectory of the tractor and trailer as it left the highway, given the accident pictures that appeared to show that the rig drove directly off the road. Farrar asserted that he gradually pulled to the left from his lane to the fog line on the side of the road, but once the trailer dropped off the pavement to the grassy shoulder, it started to slip sideways and pulled the tractor off with it.³¹

Ultimately, the grievance committee was not persuaded that the discharge letter was improper, unwarranted, and not factual. Accordingly, it denied Farrar's grievance.³²

²⁹ *Id.* at 12.

³⁰ *Id.* at 15.

³¹ *Id.* at 15-16.

³² *Id.* at 18. The committee did order Roadway to reimburse Farrar for the cost of the car that he rented so that he could return home after the accident. *Id.*

2. Department of Labor proceedings

OSHA complaint

Farrar filed a STAA complaint with OSHA in a letter dated April 16, 2005.³³ Farrar alleged that Roadway retaliated against him because he engaged in STAA-protected activities. He claimed that his discharge occurred on or about October 26, 2004, when the grievance panel upheld his discharge “based on ‘his work record and the August 1, 2004 traffic accident.’”³⁴

On May 8, 2005, Farrar sent a packet of materials relating to his claim to OSHA. OSHA returned the packet unopened to Farrar. Shortly thereafter, OSHA sent Farrar a letter dismissing his STAA claim as untimely because it found that he did not file his complaint within 180 days of the date Roadway terminated his employment in August 2004.³⁵

First ALJ proceeding

Farrar objected to OSHA’s findings and timely requested an ALJ hearing. In his letter to the ALJ, Farrar complained that the investigation had not taken all the evidence into consideration as evidenced by the fact that OSHA returned, unopened, a packet of documents that contained a letter explaining that his complaint was based upon his belief that Roadway retaliated against him by proffering false information and misstatements at the grievance committee hearing in an effort to convince the committee to sustain Roadway’s termination of Farrar’s employment and documents in support of his retaliation claim.³⁶

In response, Roadway filed a Motion to Dismiss contending that Farrar’s complaint was untimely because he filed it more than 180 days from the date Roadway terminated his employment in August 2004. The ALJ granted this Motion, finding that the “operative event” that started the 180-day limitations period was Roadway’s

³³ R. D. & O. on Rem. at 2.

³⁴ Section 31105 reprisal complaint (Apr. 16, 2005).

³⁵ 49 U.S.C.A. § 31105(b)(1) provides, “An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee’s request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.” Farrar filed the April 16, 2005 complaint within 180 days of the October 26, 2004 grievance hearing, but not within 180 days of the August 2004 termination.

³⁶ Farrar’s Objections to OSHA Findings at 1 (June 14, 2005).

termination of Farrar's employment in August 2004.³⁷ Thus, regardless whether the clock began running on August 1st, the date of the accident when Roadway Express relieved him of duty; August 7th, when it mailed the notice of discharge; or August 11th, when Farrar received the notice, Farrar filed his April 18, 2005 complaint beyond the 180-limitations period.³⁸

First Administrative Review Board proceeding

According to the STAA's implementing regulations, the Administrative Review Board issues the final decision and order for the Secretary of Labor in STAA cases.³⁹ Upon review, the Board upheld the ALJ's finding that Farrar failed to raise a question of material fact regarding the issue whether he filed a timely complaint based on Roadway's August 2004 termination.⁴⁰ Nevertheless, the Board remanded the case because the ALJ failed to address Farrar's allegation that Roadway retaliated against him when it presented its case at the October 26, 2004 grievance hearing. In so holding, the Board noted that it was not deciding whether Farrar's allegations regarding the grievance proceedings are true or whether, even if proven, would constitute retaliation and adverse action under the STAA. Instead, the Board remanded the case to the ALJ to make those determinations.⁴¹

ALJ proceedings on remand

Prior to holding a hearing on Farrar's complaint, the ALJ held two lengthy telephone conferences in an attempt to identify and clarify the issues and the focus and scope of the permissible evidentiary proof.⁴² Ultimately the ALJ issued an Order

³⁷ R. D. & O. on Rem. at 3.

³⁸ *Id.* The ALJ also found that assuming that Farrar made phone calls to OSHA and two other agencies on October 5, 2004, Farrar's contention that he called OSHA "just to give it a head's up about what may happen" is not sufficient to constitute the filing of a STAA complaint for past retaliation. Finally, the ALJ rejected Farrar's assertion that he was under the impression from the OSHA representative to whom he spoke that he could not file a complaint until the grievance proceedings were concluded. The ALJ noted that the applicable regulation expressly provides that grievance arbitration proceedings do not toll the 180-day limitations period. *Id.* at 4. See 29 C.F.R. § 1978.102(d)(3).

³⁹ 29 C.F.R. § 1978.109(c)(2); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. 2000-STA-017 (ARB May 30, 2001).

⁴⁰ *Farrar I*, slip op. at 7-8, 10.

⁴¹ R. D. & O. on Rem. at 9.

⁴² *Id.* at 7-8.

Governing Evidentiary Proof at Hearing on July 6, 2007, in which the ALJ indicated the purposes for which Farrar's exhibit "C-2 – History of alleged violations (discrimination) since Oct. 2000 OSHA filing" would be considered.⁴³ This exhibit consisted of the packet of documents that OSHA had refused to accept after Farrar filed his complaint and that Farrar subsequently filed with the ALJ, who treated it as a proffer to establish a history of discrimination that would prove adverse motive.⁴⁴ The ALJ ruled that the

evidence proffered would be time barred as a remediable complaint, but that "the nature of the complaint under the STAA, and, in particular, the complaint that Respondent's presentations at the [grievance] hearing reflect unlawful animus and the continuation of a pattern of discriminatory practice by Respondent against Complainant, makes Complainant's proffered evidence relevant as background to the alleged discriminatory conduct and proof of animus which Complainant claims occurred at the hearing. As such it would be admissible as relevant evidence at the hearing."^{45]}

The ALJ further concluded that even though he had ruled that the exhibit was admissible, it would not be "deemed admissible to show a causal connection or relationship until an adequate foundation had been established showing that there had been discriminatory activity on Respondent's part and that there had been prior protected activity."⁴⁶

At the hearing, Farrar repeated the version of the August 1, 2004 accident that he provided to the grievance committee. He testified that he was forced off of the road by an oncoming car that drove over the center line and that when he attempted an evasive maneuver, he lost control of the vehicle and it overturned.⁴⁷

⁴³ This exhibit includes the diary of allegedly discriminatory incidents that Farrar maintained since 2000.

⁴⁴ R. D. & O. on Rem. at 8.

⁴⁵ *Id.* Thus, while the ALJ admitted Farrar's exhibit C-2 into evidence, he stated that it would be subject to the constraints provided by the principles of Fed. R. Evid. 403, allowing evidence to be excluded to the extent that its probative value is outweighed by other considerations. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 15.

The ALJ advised Farrar that it was essential to his case that he testify to “each and every false or misleading statement or representation of concern to him as a basis for his complaint, and that he explain why he considered the statement or representation to be false or misleading.”⁴⁸

In particular, Farrar stated that Williams’s statement that he should have been able to stop on the grass verge was a misrepresentation because, based on the charts and safety courses he had taken, it would take 288 feet at 55 miles per hour on dry pavement with good brakes and good tires to stop a typical tractor trailer, and twice the dry pavement stopping distance to stop a vehicle on wet pavement. He estimated that it would have taken him 800 to 1000 feet to stop on the muddy ditch. Farrar said that he did not know whether the grievance committee panelists were truck drivers, but that they had years of experience within the companies in the freight business. He averred that given he was travelling 55 miles an hour, the committee should have known that it was not possible to stop in less than 288 feet. Consequently he contended that this was false and misleading information presented to the committee.⁴⁹

Farrar also testified that the photographs that were presented did not show tire tracks consistent with a driver asleep at the wheel, and that Trooper Hill had observed those tracks at the scene of the accident as reflected in the Florida Highway Patrol accident report available to the company, which did not cite Farrar for improper driving. Farrar testified “that it was misleading at a minimum on the part of the company to keep hammering that these photos did not support the statements that were in my statement and also the Florida Highway Patrol report which was included and presented as evidence at that committee.”⁵⁰

Farrar explained that Williams’s contention that Farrar’s written narrative describing the accident did not indicate that he had applied brakes, flashed his headlights, or taken other actions to avoid the accident was misleading because he flashed his lights before the point in time when he began his narrative and that there was an S-curve in the road approximately where the truck left the road.⁵¹

Farrar contended that Williams’s statement that it is obvious that “he is a danger to the motoring public” and that it “it is very fortunate this repeat performance of his past history did not cost him or someone else their life” was misleading because none of the previous five accidents he had while driving for Roadway was his fault.⁵²

⁴⁸ *Id.* at 14.

⁴⁹ *Id.* at 13, 14.

⁵⁰ *Id.* at 15.

⁵¹ *Id.* at 13.

⁵² *Id.* at 14.

According to Farrar, Williams overstated the value of the lost freight and understated the salvage based on a photo showing a fifty-three foot trailer loaded practically to the rear with salvaged freight. He also testified that contrary to Williams's contention, there was no HAZMAT leak because the fuel oil from the tractor-trailer that was released into a creek is not considered a hazardous reportable material under Department of Transportation regulations.⁵³

As additional evidence of retaliation, Farrar cited to the fact that Roadway failed to conduct a thorough investigation of the accident and did not expeditiously furnish the Highway Patrol with requested information so that it could complete its accident report.⁵⁴ He also suggested that the grievance committee accepted Roadway's misrepresentations because Williams had presented cases to the committee for a number of years and "it is my understanding [that] they would place a rather high level of credibility on his statements as being fact" and "more credibility would have been given to him . . . because these people are more familiar with him versus anything that I would have to say."⁵⁵

Upon cross-examination, Farrar admitted that it was true that in his written statement he did not mention that he flashed his lights prior to the accident, that the accident caused diesel fuel to spill into the creek, that the accident damaged customer freight, that the road surface was dry, that the weather was clear, that he did not put on his brakes, and that he had slowed down from 60 to 55 miles per hour before the accident.⁵⁶ He also admitted that he never contended at the grievance hearing that Roadway had terminated his employment in retaliation for whistleblowing. He stated that he failed to do so because the grievance panel did not deal with those issues and is concerned only with violations of The National Master Freight Agreement.

In rebuttal, Williams testified that when he presented Roadway's arguments to the grievance committee, he was not aware that Farrar previously had filed a whistleblower complaint with OSHA.⁵⁷ He confirmed that in a single vehicle accident in which there was no damage to other vehicles or other extensive damage to non-company property, such as a building, an adjuster was not normally requested to investigate.⁵⁸ He stated that

⁵³ *Id.* at 15-16. Tr. at 120.

⁵⁴ R. D. & O. on Rem. at 15.

⁵⁵ Tr. at 97-98.

⁵⁶ R. D. & O. on Rem. at 17.

⁵⁷ Tr. at 140.

⁵⁸ *Id.* at 142.

when he averred at the hearing that Farrar had not flashed his lights before the accident, he had no knowledge that he had ever flashed his lights.⁵⁹ He clarified that when he stated at the hearing that there had been a release of hazardous materials, he was under the misimpression that there had been a release of hazardous freight, but he later learned only diesel fuel was released.⁶⁰ Williams testified that his statement that freight was damaged was based on a statement from Doss, but that he could also tell that freight was demolished by looking at the accident scene photographs.⁶¹

Williams reiterated his opinion that Farrar fell asleep at the wheel and explained that he based his opinion on the accident scene photographs.⁶² He noted that Farrar veered off the road in a straight line and that fact coupled with Farrar's statement that he never applied the brakes, left him to conclude that Farrar fell asleep.⁶³ He stated that he could not imagine why a driver would not apply brakes in the situation that Farrar described.⁶⁴ He emphasized that he had formed his opinion based on the evidence as he saw it, but acknowledged that it was just his opinion since he was not there and could not know for sure whether Farrar fell asleep.⁶⁵ He explained that in his 22 years as a labor manager, he had participated in hundreds of cases involving preventable accidents and that he did not act any differently in Farrar's case than he had in any of the others.⁶⁶

Williams disputed Farrar's assertion that the committee would accept anything he said as fact. He emphasized that of the many cases he presented, he lost a lot of them, including a previous case against Farrar.⁶⁷ He testified that Tomlinson's reputation before the grievance committee was very reputable and comparable to his own.⁶⁸ He also

⁵⁹ *Id.* at 141.

⁶⁰ *Id.* at 142-143. He nevertheless maintained that diesel fuel is, in fact, a hazardous material.

⁶¹ *Id.* at 144, 155.

⁶² *Id.* at 144-145.

⁶³ *Id.* at 145-146.

⁶⁴ *Id.* at 145.

⁶⁵ *Id.* at 146.

⁶⁶ *Id.* at 147.

⁶⁷ *Id.* at 152.

⁶⁸ *Id.* at 172-173.

explained that although he received documents from Doss, including the accident scene photographs and the attachments to his committee brief, he drafted the brief to the committee himself.⁶⁹ He confirmed that he had total discretion in presenting the case to the committee and that Doss did not indicate a preference as to the ultimate outcome.⁷⁰

Upon consideration of the testimony and other evidence presented, the ALJ ultimately concluded that Farrar established that he engaged in protected activity and that Roadway knew of the activity since it was based on a prior STAA whistleblower complaint.⁷¹ Nevertheless, the ALJ concluded that Farrar could not prevail because he had failed to prove by a preponderance of the evidence that the argument in favor of sustaining the termination of Farrar's employment that Williams presented at the grievance committee hearing was either retaliatory or discriminatory.⁷² Furthermore, the ALJ concluded that even if he accepted as true Farrar's 41 allegations of adverse action by the Respondent following his prior STAA complaint and that Farrar was proved to be blameless with respect to them, it would be "utterly improbable" that Farrar could establish that the Respondents took these actions in retaliation for filing the complaint or that Roadway's presentation at the grievance proceeding was retaliatory in nature. Thus, the ALJ concluded that, "[e]xtended proof by Farrar of the individual incidents in question, whether or not disputed by Respondent as threatened, could not reasonably be expected to affect the outcome of this case or to establish the retaliatory motive or effect that Farrar alleged."⁷³

This case is before the ARB again pursuant to the STAA's automatic review provisions.⁷⁴ The Board issued a Notice of Review and Briefing Schedule, informing the parties of their right to file briefs in support of or in opposition to the ALJ's Recommended Order of Dismissal. Both of the parties filed briefs with the Board.

⁶⁹ *Id.* at 155.

⁷⁰ *Id.* at 157.

⁷¹ R. D. & O. at 19-20. The ALJ acknowledged that even though Doss's knowledge of Farrar's prior OSHA complaint could be imputed to Roadway, Williams testified that he did not know that Farrar had previously filed an OSHA complaint. *Id.* at 20.

⁷² *Id.* at 21, 23-24.

⁷³ *Id.* at 24.

⁷⁴ "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).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations.⁷⁵ The ARB is required to issue “a final decision and order based on the record and the decision and order of the administrative law judge.”⁷⁶ The Board is bound by the ALJ’s factual findings if those findings are supported by substantial evidence on the record considered as a whole.⁷⁷ 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.”⁷⁸ Substantial evidence does not, however, require a degree of proof “that would foreclose the possibility of an alternate conclusion.”⁷⁹ 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.”⁸⁰ We review the ALJ’s conclusions of law de novo.⁸¹

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 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). Protection is also afforded where

⁷⁵ 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.

⁷⁶ 29 C.F.R. § 1978.109(c)(1).

⁷⁷ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998).

⁷⁸ *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).

⁷⁹ *BSP Trans., Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998).

⁸⁰ *Dalton v. U.S. Dep’t of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 1993), citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989); *Noeth v. Indiana W. Express, Inc.*, ARB No. 07-042, ALJ No. 2006-STA-034, slip op. at 3 (ARB Mar. 19, 2009).

⁸¹ *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, -029, slip op. at 2 (ARB Oct. 31, 2003).

an employee “refuses 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).

To prevail on his STAA claim, Farrar must prove by a preponderance of the evidence that: 1) he engaged in protected activity, 2) Roadway was aware of the protected activity, 3) Roadway 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.⁸² Farrar bears the burden of persuading the trier of fact that he was subjected to discrimination.⁸³ If Farrar does not prove one of these requisite elements, his entire claim fails.⁸⁴

For purposes of this decision, we will accept the ALJ’s finding that Farrar has established that he engaged in protected activity when he filed a STAA complaint in 2000 and that Roadway knew that he had engaged in such activity. We need not decide here whether defending a grievance could ever be considered adverse action because we agree with the ALJ that Farrar has failed to establish that Roadway presented false information and misleading statements to the grievance committee because Farrar filed the prior STAA complaint.

Farrar argues to the Board that Roadway management did not actually believe that Farrar fell asleep at the wheel and that he should have been able to avoid the accident that preceded his firing. Instead, he avers that Roadway concocted this defense to retaliate against him because he filed a prior STAA complaint. Farrar also contended that even if Williams acted in good faith in presenting the defense, he was actually just a cat’s paw for Doss, who provided Williams with the documents upon which the defense was based. He further submitted that the fact that Roadway did not accept the Georgia State Patrol’s report, which incorporated Farrar’s description of the accident, established that Roadway was not interested in reaching the truth, but only in retaliating against him.⁸⁵

We agree with the ALJ that for Farrar to prevail in his argument that Roadway’s defense at the grievance proceeding was retaliatory, he must first establish that Roadway presented false and misleading representations to the committee, as he alleged in his

⁸² *BSP Trans, Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envtl. Servs., 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).

⁸³ *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

⁸⁴ *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).

⁸⁵ Complainant’s Brief in Opposition to Administrative Law Judge’s Decision at 1.

complaint. The grievance committee, however, dealt Farrar's argument a severe blow when it upheld Roadway's termination of Farrar's employment on the grounds that his accident was avoidable. As the ALJ found:

The grievance committee, which found against Farrar and denied his grievance, had extensive experience with both the trucking industry and grievance proceedings. The panel's two union and two employer representatives were unrelated to the parties or to the local union which would tend to promote impartiality. Questioning by panel members and other conduct in the grievance proceeding was reasonable, and disclosed no evidence of hostility, bias, or unfairness toward either party. Neither party was inhibited in presenting its case. Farrar conceded as much on the record of the grievance proceeding. The case for each party was presented by an apparently competent professional experienced in such presentations at grievance proceedings, though neither presenter was a lawyer. There was no evidence in the record of significant or substantial disparity in ability or credibility of these presenters with the grievance panel. Thus, the established adversarial process before the grievance panel provided a reasonable opportunity to discover, disclose, and identify any reasonably obvious falsehood or misrepresentation by Roadway, even though only Farrar gave testimony.^[86]

Farrar's only explanation for why the highly experienced members of the grievance committee would accept Williams's account of the accident and reject Farrar's is that Williams had more credibility with the panel, so members simply accepted everything that Williams said as true. This highly experienced committee had the opportunity to hear Farrar's testimony, to consider the evidence presented, and to question Farrar, yet Farrar would have the Board believe that the panel was so overwhelmed by Williams's credibility (and apparently so unimpressed with the credibility of Tomlinson and Farrar) that the members totally abdicated their responsibility to carefully weigh and evaluate the testimony and evidence. Furthermore, if Williams did have credibility with the committee, such credibility necessarily was based on a reputation for being knowledgeable of the trucking industry and straight forward and honest in his dealings with the committee. These traits are antithetical to Farrar's contention that either out of ignorance or retaliatory intent, Williams presented a baseless case to the committee, which they were too blind to see through.

Farrar has presented absolutely no proof that the committee members were unduly swayed by Williams's credibility, an allegation that impugns the integrity of the members

⁸⁶ R. D. & O. on Rem. at 22.

and the fairness of the proceedings. He appears to rely solely on the fact that the committee ultimately accepted Roadway's position rather than his own. Farrar's contention is also belied by the fact that Williams testified that over his tenure as a Roadway representative, he had lost many cases, including one involving Farrar. In the absence of any evidence supporting Farrar's unsupported allegation, we decline to accept Farrar's argument, that the committee rubberstamped Roadway's position out of deference to Williams.⁸⁷

The ALJ carefully and thoroughly reviewed the evidence and found:

Even though Farrar's alleged nemesis, Michael Doss, . . . briefed [Williams], there is no dispute that the tractor trailer was wrecked and overturned in a ditch beside the road, and the issue before the grievance panel was whether, as Farrar contended, he had been forced off the road by an oncoming vehicle with high beams, and had lost control of his tractor trailer because of a soft shoulder, or whether, as Roadway contended, he had fallen asleep and run off the road. Farrar's testimony describing his version of what happened to cause the accident, and to what extent the photographs in evidence supported his assessment does not conclusively refute Roadway's contention that he fell asleep and lost control, so as to have rendered Roadway's contention clearly recognizable as false or misleading, or so patently unreasonable or incredible or so improbable as to have exceeded the limits of fair and reasonable adversarial argument.^[88]

CONCLUSION

Upon review, we hold that the ALJ's findings are supported by substantial evidence and are thus, conclusive. Furthermore, we agree with the ALJ that because Farrar has failed to establish that Roadway's defense of his termination was either false or misleading, he cannot prevail in his claim that Roadway's defense of his grievance

⁸⁷ As for the fact that the Georgia State Patrol, based on Farrar's description of the accident, did not cite Farrar for any traffic offense; the grievance committee did not find this fact to be dispositive and neither do we. Without knowing the considerations that went into the Officer's decision not to charge Farrar, we cannot conclude that Roadway's evaluation of the accident was unreasonable or retaliatory.

⁸⁸ R. D. & O. on Rem. at 23.

was retaliatory. Accordingly, we accept the ALJ's recommendation and **DENY** Farrar's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge