In the Matter of:

MARTIN KERCHNER,

COMPLAINANT,

v.

GROCERY HAULERS, INC.,

RESPONDENT.

ARB CASE NO. 08-066

ALJ CASE NO. 2007-STA-041

DATE: June 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Martin Kerchner, pro se, Avenel, New Jersey

For the Respondent:
Dion Y. Kohler, Esq., Brandon M. Cordell, Esq., *Jackson Lewis LLP*, Atlanta, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Martin Kerchner filed a complaint with the United States Department of Labor alleging that his former employer, Grocery Haulers, Inc., (GHI), violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA or Act), 49 U.S.C.A. § 31105 (Thomson/West Supp. 2005); 29 C.F.R. Part 1978 (2009) when it terminated his

employment.[1] Pursuant to a Recommended Decision and Order (R. D. & O.) issued March 19, 2008, a Department of Labor Administrative Law Judge (ALJ) concluded that Kerchner had not proven by a preponderance of the evidence that GHI discriminated against him in violation of the Act. The ALJ also concluded that the Occupational Safety and Health Administration (OSHA) erroneously dismissed a blacklisting claim and recommended that this claim be remanded to OSHA for investigation. For the reasons hereafter discussed, we affirm the ALJ's Decision and Order, in part, and reverse, in part.

BACKGROUND

GHI is a privately held trucking company that specializes in food distribution services throughout the greater New York, New Jersey, and the mid-Atlantic area. GHI employed Kerchner as a truck driver from December 2000 until his suspension and termination in August 2005. Drivers at GHI are represented by the International Brotherhood of Teamsters, Local 863.

On the night of August 11, 2005, Kerchner reported for work at 9:00 p.m. At about 12:30 a.m. on August 12th, Kerchner entered the dispatch office for his next assignment. When the dispatcher gave Kerchner an assignment, which Kerchner believed to be less lucrative than his typical assignments, he became agitated and refused the assignment. When management learned of the refusal, they fired Kerchner for violating company policy.

On August 25, 2005, Kerchner filed a complaint with OSHA alleging that GHI terminated his employment because he complainied about unsafe working conditions. During OSHA's investigation, Kerchner further claimed that he was blacklisted from employment with a different trucking company, Silver Line, when he applied for a job with that company in September of 2005. OSHA dismissed Kerchner's claim under the STAA, finding that he failed to prove his case of retaliatory discharge against GHI and, construing his blacklisting claim as being a claim against Silver Line, found that his blacklisting claim was untimely.

Kerchner objected to OSHA's findings, and timely requested a hearing before the Office of Administrative Law Judges. An Administrative Law Judge (ALJ) heard the case on October 2, 2007. Based upon the evidence and presentation of the parties, the ALJ issued a Recommended Decision and Order. The ALJ recommended that Kerchner's claim of retaliatory suspension and discharge against GHI be dismissed based upon the ALJ's determination that neither the suspension nor the discharge were causally related to any protected activity and thus did not constitute STAA violations. As to Kerchner's claim of blacklisting, the ALJ concluded that OSHA misconstrued Kerchner's blacklisting claim as a claim against Silver Line instead of a claim against GHI and Local 863. Accordingly, the ALJ concluded that Kerchner timely filed his blacklisting claim, and recommended that the blacklisting claim be remanded to OSHA for investigation.

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[1] Congress amended the STAA in 2007 after Kerchner filed his complaint with OSHA. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

The Board has automatic review of the ALJ's Recommended Decision and Order. 29 C.F.R. § 1978.109(a).

DISCUSSION

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a). Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings. The Board reviews the ALJ's conclusions of law de novo. *Lyninger v. Casazza Trucking Co*., ARB No. 02-113, ALJ No. 2001-STA-038 (ARB Feb. 19, 2004).

I. Kerchner's Claim of Retaliatory Discharge

The ALJ held that, while Kerchner did engage in protected activity during his career with GHI, the actionable adverse actions he suffered, his suspension and termination, were the result of his refusal to drive on August 12, 2005, and that his refusal was not protected under the STAA.

The record has been reviewed, and we find that the ALJ's factual findings in the adjudication of the whistleblower retaliation claim are supported by substantial evidence on the record as a whole and are therefore conclusive.

The record fully supports the ALJ's well-reasoned decision, and we therefore adopt the reasoning and legal analysis expressed by the ALJ in the retaliation claim. Specifically, the record supports the ALJ's determination that Kerchner's actionable adverse actions were his suspension and termination and that these occurred as a result of his refusal to drive. R. D. & O. at 25, 31, 33.

Further, the record supports the ALJ's determination that his refusal to drive was based on reasons unrelated to protected activity. Under the STAA an employee is protected for refusing to drive if that refusal is based on a violation of a federal safety regulation or on a reasonable apprehension of serious injury to the driver or others. 49 U.S.C.A. § 31105(a)(1)(B); *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 4 (ARB July 31, 2003). The ALJ found Kerchner did not refuse to drive due to fatigue or a reasonable apprehension of serious injury to himself or others; rather, he refused to drive because he did not want that particular assignment. R. D. & O. at 42-43. We affirm.

II. Kerchner's Blacklisting Claim

The ALJ also concluded that Kerchner timely filed his blacklisting claim against GHI with OSHA. OSHA erroneously identified Silver Line, the third-party employer to whom Kerchner had applied for work subsequent to GHI's termination of his employment, as the party-respondent. Therefore, OSHA did not investigate the claim because it concluded that Kerchner's

blacklisting claim was untimely. The ALJ, to the contrary, found that the record evidence supported Kerchner's contention that he properly and timely asserted his blacklisting against GHI. R. D. & O. at 6-7. In light of the documentary evidence Kerchner submitted detailing the dates and times of his correspondence with OSHA, and in which he identified GHI as the party against whom he asserted the blacklisting claim, we find that substantial evidence of record supports the ALJ's finding that Kerchner timely filed his blacklisting claim. See Respondent's Exhibit-17, at 37.

The ALJ, in light of her determination that GHI was the proper party respondent to the blacklisting complaint, and that Kerchner had timely filed the complaint, recommended that the blacklisting claim be remanded to OSHA for investigation since OSHA had failed to investigate this claim because of its erroneous timeliness determination**.** The ALJ noted that the prevailing STAA regulations "do not provide explicit authority to remand a matter to OSHA, neither do they preclude such action." R. D. & O. at 8 n.7. The ALJ contrasted the implementing regulations of SOX and AIR 21, which preclude an ALJ from remanding a claim to OSHA but require, instead, that the ALJ maintain jurisdiction to hear the case in its entirety.[2]

We conclude that the ALJ erred in remanding the blacklisting claim to OSHA for investigation. While the STAA regulations do not expressly prevent an ALJ from remanding a claim to OSHA for reconsideration, in *Freeze v. Consolidated Freightways, Inc.*, ARB No. 04-128, ALJ No. 2002-STA-004 (ARB Aug. 31, 2005), the ARB pointed out that "neither STAA nor its implementing regulations vest ALJs with authority to compel OSHA to conduct investigations." *Freeze*, ARB No. 04-128, slip op. at 2 n.3. Accordingly, where, as here, a complainant has alleged ongoing retaliation after he has filed his initial claim that OSHA has either failed or refused to consider, the ALJ should afford the complainant the opportunity to have the ALJ hear his claim after, of course, the ALJ has given to the respondent proper notice and an adequate opportunity to conduct discovery and prepare its defense against the claim.

The ALJ Rules provide:

> *Amendments and supplemental pleadings.* If and whenever determination of a controversy on the merits will be facilitated

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[2] The AIR 21 and SOX regulations provide:

> Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation . . . nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.

29 C.F.R. § 1979.109(a)(2009)(AIR 21); 29 C.F.R. § 1980.109(a)(2009) (SOX).

> thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

29 C.F.R. § 18.5(e)(2009).

CONCLUSION

Accordingly, we affirm in part and reverse and remand in part the Recommended Decision and Order herein appealed. We affirm the ALJ's recommendation dismissing Kerchner's claim of retaliatory suspension and discharge in violation of the whistleblower protection provisions of the STAA. With respect to Kerchner's blacklisting claim, we affirm the ALJ's finding that the claim was timely filed but vacate the ALJ's order remanding the claim to OSHA for investigation, and instead remand the blacklisting claim to the ALJ for adjudication.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge