In the Matter of:

DANIEL M. SALATA,	**ARB CASE NOS. 08-101, 09-104**
COMPLAINANT,	**ALJ CASE NOS. 2008-STA-012, 2008-STA-041**
v.	
CITY CONCRETE, LLC,	**DATE: September 15, 2011**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant, Salata I, ARB No. 08-101:
Daniel M. Salata*, pro se*, New Springfield, Ohio

***For the Complainant, Salata II, ARB No. 09-104*:**
Vicki Messer-Salata, lay representative, New Springfield, Ohio

***For the Respondent*:**
James L. Blomstrom, Esq., *Harrington, Hoppe & Michell*, Youngstown, Ohio

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis Corchado, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105. The Complainant, Daniel M. Salata, a truck driver, alleged that his employer violated the STAA when it terminated his employment because he complained about his truck. The STAA protects employees from discrimination when they report violations of

commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules or it would be unsafe. Following a hearing, an Administrative Law Judge (ALJ) issued a decision on June 18, 2008, that found, inter alia, that Salata's termination did not violate the STAA because the Respondent, City Concrete, LLC, terminated his employment solely for legitimate, nondiscriminatory reasons, and dismissed the complaint. *Salata v. City Concrete,* No. 2008-STA-012, (June 18, 2008)(ALJ Decision I) Salata filed a second complaint alleging a STAA violation that was connected to his initial claim. On June 8, 2009, the ALJ issued a second decision granting a motion for summary decision because he concluded the facts Salata asserted did not constitute an adverse action under the STAA. *Salata v. City Concrete*, No. 2008-STA-049 (June 8, 2009)(ALJ Decision II). The ARB affirmed both ALJ decisions by a Final Decision and Order dated September 23, 2010. *Salata* v. *City Concrete,* ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041; slip op. at 2 ("ARB Decision").

Salata petitioned the Federal Court of Appeals for the Sixth Circuit for review of the Board's decision. On June 27, 2011, the court entered an order remanding the case and directing this Board to consider whether the 2007 STAA statutory amendments to the burden of proof apply to this case, and if so whether those amendments compel a different result. See 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act); 49 U.S.C.A. § 31105(b)(1). Following further briefing by the parties, we hold that the 2007 amendments to STAA's burden of proof standard apply in this case. Applying that standard to the ALJ's findings of fact, we affirm the ALJ's recommended decision and orders and dismiss Salata's complaints.

BACKGROUND

A. Facts

1. Salata I

In our September 23, 2010 decision, we determined that the ALJ's material findings of fact were supported by substantial evidence, and accordingly, we incorporated those facts in our Final Decision. See ARB Decision, slip op. at 2. The facts, adopted from our prior decision, slip op. at 2-4, are as follows:

Salata, was a truck driver for City Concrete, first driving a rear-discharge truck and later, a front-discharge truck. On August 3, 2007, City Concrete sent Salata to deliver concrete to a jobsite at Youngstown State University (YSU) in truck #509. Salata's truck had a difficult time climbing the grade to unload the concrete but did eventually make it up the hill to unload. The customer did not want truck #509 to come back to deliver more concrete. Salata's supervisors, George Lesko and Rick Flesher, told him to take another load of concrete to the YSU site. Salata, again with difficulty and after multiple attempts, made it up the grade to deliver the concrete. The customer still

did not want truck #509 to come back to the site and did not think it could climb the grade. Salata's truck destroyed the grade, and the customer had to bring a machine to regrade it. The customer called and complained to City Concrete's dispatcher and another truck was able to climb the "non-severe" grade. Salata's supervisors sent Salata back to the site for a third time with another load of concrete. On the way there, the truck broke down, and City Concrete's mechanic, Ed Knebel, temporarily repaired it. Salata continued to take and deliver the third load of concrete to the YSU site. ARB Decision, slip op. at 2.

Salata then returned to City Concrete with the truck and spoke to John Annichenni, part-owner and president of City Concrete. Salata told Annichenni that truck #509's engine had no power. Annichenni told Salata to take the truck to maintenance. Salata filled out a vehicle inspection report (VIR) form stating that the truck should not be on the road until it was fixed, but he never submitted this VIR to City Concrete. *Id.*, slip op. at 2-3.

Annichenni then went upstairs to City Concrete's offices and asked what had been going on at the YSU job. His employees in the office told him that the customer did not want Salata back on the job because there was a problem with the truck, and it could not climb the grade. Then Annichenni's employees told him that Salata had had some problems with wet loads,[1] that he had had an accident at the plant, and about contractor job problems. Annichenni began to consider whether Salata was careless and that he was still within the probationary period, after which it would be difficult to terminate his employment if necessary. Annichenni wanted to investigate and wanted maintenance to find out if anything was wrong with the truck. There is evidence that Salata was in an accident at the plant and that he had wet loads on two or three occasions. There is also evidence that Salata did not know how to properly drive a front-discharge truck and that he needed to put the truck in low range to accelerate. *Id.*, slip op. at 3.

After Annichenni talked to his employees about Salata, he decided to talk to his partners about what to do, and they left the matter up to him. Annichenni was skeptical about Salata's complaints about the lack of power in truck #509. The maintenance shop made some adjustments to the truck after the events of August 3, 2007, but did not find anything wrong with it. Annichenni terminated Salata's employment. Knebel testified that there have been no serious complaints about truck #509 since Salata was terminated and that the truck has been in service. *Id.*

The following evidence was also offered at the hearing. From July 24, 2007, to August 1, 2007, Salata filled out and turned in seven white vehicle inspection reports (VIRs) to his employer regarding truck #509, a front discharge truck. He retained yellow copies of the VIRs for himself. On each of these VIRs, Salata wrote that the engine had

[1] A "wet load" is a load of concrete that has too much water mixed with it so that it is unusable and must be dumped. ARB Decision, slip op. at 3 n.1.

no power. On the form for July 25, 2007, Salata checked a box that indicated that he did not find any defects. He testified that he checked this box because, while he knew there was a problem and looked for the problem, he could not find it. Salata's copies of the remaining VIRs do not have the "no defects found" box checked. However, City Concrete's white copies for July 24, July 27, and August 1, 2007, each have the "no defects found" box checked. *Id.*

The mechanic for City Concrete, Ed Knebel, who also signs the VIRs, testified that it was possible that he could have marked something on the VIR forms, thinking that the issues raised had been addressed. He testified that he checked over Salata's power complaints extensively. He made repairs to truck #509 on July 26, 2007, and August 1, 2007. He had other drivers in similar units drive truck #509, and they claimed that it drove similarly to their trucks. He stated that if other people drive a similar vehicle and they say that it drives the same as theirs, there is not much more he can do about it. *Id.*, slip op. at 4.

Michael Robertson, a court-qualified forensic document examiner, testified that the ink used for Salata's signature and the "x's" marked on the VIR form for July 24, 2007, were the same but that the "x's" were made on the white form after it was removed from the yellow copy. He testified that for the form dated July 27, 2007, the "x's" were likely printed by the mechanic, Knebel, using the same pen he used to sign the form. Finally, he testified that the inks in the "x's" and in Salata's signature were the same for August 1, 2007. *Id.*

Salata filed his complaint on August 10, 2007. The Occupational Safety and Health Administration (OSHA) investigated and determined that Salata failed to demonstrate that his protected activity was a contributing factor in his termination.

2. Salata II

Salata filed a second complaint on February 13, 2008, that stemmed from the initial complaint. During the discovery in the first complaint, it was determined that copies of the Records of Duty Status and Vehicle Inspection Reports (RODS-VIRS) Salata completed and retained were different from the copies retained by the company. The circumstances surrounding the discrepancy are set out in the ALJ's decision, ALJ Decision II at 2-3. "Specifically, on several dates, [Salata] had written 'no engine power' on the RODS-VIRS." *Id.*, slip op. at 2. "This phrase appeared on both the white copy, Respondent's copy, and the yellow copy, Complainant's copy." *Id.* "On Respondent's white copy, however, a box marked 'no defects found' was checked." *Id.* "The 'no defects' box was not checked on the yellow copy retained by Complainant." Salata alleged in this second complaint that after his termination, City Concrete forged some of the paperwork that he had signed and turned in and that because of the forgeries, OSHA and the ALJ in his first claim did not have accurate evidence on which to base their decisions. City Concrete moved for summary decision, asserting that Salata had not stated a claim under the STAA. Salata opposed the motion, arguing that there was a

genuine issue of material fact as to whether City Concrete submitted altered or fabricated documents to OSHA and the ALJ.

B. *Administrative Law Judge Decisions*

1. ALJ Decision as to Salata I (ALJ Decision I)

After a hearing, the ALJ recommended that we dismiss Salata's claim, finding that City Concrete terminated Salata's employment solely for legitimate, nondiscriminatory reasons, e.g., "the accident, wet load, and, Mr. Annichenni's belief that [Salata's] complaints about truck #509 were largely unfounded." ALJ Decision I, slip op. at 4, 11.

Based on the credibility of witness testimony, the ALJ determined that the reason that City Concrete terminated Salata's employment was "solely because Mr. Annichenni foresaw problems based on the allegations he was advised of, that is the accident, wet loads, customer complaints, and his own skepticism about Mr. Salata's lack of truck power complaints related to #509. *Id.* at 11. The ALJ observed that "City Concrete had the normal defects one would expect with a fleet of vehicles, but, for the most part had them regularly and timely inspected and repaired." *Id.* The ALJ stated that "City Concrete, as a small business, had previously let go three probationary employees before which is consistent with Mr. Annichenni's testimony about his concerns with the union." *Id.* The ALJ stated, "[t]o accept Mr. Salata's position, I would have to disbelieve the testimony of nearly every other witness. Finding the other witnesses credible, I decline to do so." *Id.*

The ALJ then analyzed the two provisions upon which Salata alleged violations: The complaint provision at 49 U.S.C.A. § 31105(a)(1)(A), and the refusal to drive provisions at 49 U.S.C.A. § 31105(a)(1)(B).

The ALJ found that Salata satisfied the Act's complaint provision, 49 U.S.C.A. § 31105(a)(1)(A) because he complained "either in writing or verbally to company supervisors that the company's refusal to repair safety defects on the delivery trucks violated federal trucking regulations," and that these communications comprised "daily inspections and verbal statements regarding truck maintenance requests." ALJ Decision I, slip op. at 14. The ALJ observed that under the STAA, "an employee's complaint need only be 'related' to a safety violation in order to be protected." *Id.* The ALJ credited Salata's testimony that he "made various communications to supervisors because he had a reasonable belief that such defects were a safety hazard." *Id*. The ALJ thus determined that these communications to his supervisors "are eligible for protection under the STAA." *Id.*

The ALJ found that Salata did not satisfy the refusal to drive provision of 49 U.S.C.A. § 31105(a)(1)(B). *Id.*, slip op. at 15. The ALJ noted that under this provision

"[a]n employee must actually refuse to operate a vehicle to be protected." *Id.*, slip op. at 15. The ALJ observed that while Salata claimed that he refused to drive truck #509 on August 3, 2007, until it was fixed, and never again drove for the company, the ALJ determined that "[n]o other evidence corroborates that testimony" and thus the ALJ concluded that "it did not occur." *Id.* The ALJ determined that "although [Salata] may have established that a genuine violation of a federal safety regulation would have occurred and that there existed a reasonable apprehension of serious injury if he drove it, he did not establish that he actually refused to drive the truck." *Id*.

The ALJ next determined that, despite the protected activity in which Salata engaged, City Concrete did not terminate Salata's employment due to the protected activity. *Id.*, slip op. at 16. The ALJ held that City Concrete terminated Salata for "the accident, wet loads, and, Mr. Annichenni's belief that his complaints about truck #509 were largely unfounded." *Id.*, slip op. at 16-17. The ALJ further found that "just as importantly, Mr. Annichenni felt he needed to fire this probationary employee before the probationary period ended to avoid the ordeal he had gone through trying to terminate a non-probationary employee for which there were solid grounds for termination." *Id.*, slip op. at 16. Based on this evidence, the ALJ concluded that "Salata was a probationary employee of concern[,]" and that there was "no discriminatory intent in Salata's termination." *Id*. Based on the evidence in the record, the ALJ concluded that City Concrete "has established that absent any protected safety complaints or protected refusals to drive on Salata's part, the company legitimately would have fired him," and that the company "provided a credible explanation for discharging [him]." *Id.*, slip op. at 17; *see also id.* at n.15 ("Even had protected activity constituted a basis for the discharge, it is established that Mr. Annichenni would have terminated Mr. Salata before the probationary period ended, based on legitimate reasons, previously described.").

2. ALJ Decision as to Salata II (ALJ Decision II)

On June 8, 2009, the ALJ granted City Concrete's motion for summary decision, finding that Salata had not suffered an adverse employment action as a result of the alleged forgery. ALJ Decision II, slip op. at 3-5.

The ALJ found that, even if there had been a forgery, and that OSHA and the ALJ in his first claim relied on false evidence, such reliance does not constitute an adverse employment action. ALJ Decision II, slip op. at 4. The ALJ further determined that Salata failed to meet his burden to demonstrate that there remained a genuine issue of material fact for a hearing. *Id.*, slip op. at 4-5. The ALJ finally determined that Salata's other arguments pertained to allegations of error in the first claim and were not properly before him. *Id.*, slip op. at 5.

CONSOLIDATION OF ARB CASE NOS. 08-101 AND 09-104

In our decision of September 23, 2010, we consolidated the ALJ's cases addressing Salata's complaints "[i]n view of the substantial identity of the legal issues and commonality of much of the evidence, and in the interest of judicial and administrative economy." ARB Decision, slip op. at 5. Those principles still apply here and these cases remain consolidated for purposes of our review.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the 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). The Board automatically reviews STAA decisions issued on or before August 31, 2009. 29 C.F.R. § 1978.109(c)(1). In reviewing STAA cases, the ARB 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); *Reiss v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 3 (ARB Nov. 30, 2010). The ARB reviews conclusions of law de novo. *Id*. The Board generally defers to ALJ factual findings that are based on a witness's credibility as demonstrated by the witness's demeanor or conduct at the hearing except "where the recommended decision is marked by error so fundamental that its fact findings are inherently unreliable." *Hall v. U.S. Dugway Proving Ground,* ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 27 (ARB Dec. 30, 2004), *aff'd sub nom. Hall v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 476 F.3d 847 (10th Cir. 2007). The ARB issues "a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

DISCUSSION

A. Governing Law

The court of appeals remanded this case so that we can consider whether the 2007 statutory amendments to the STAA's burden of proof standard applies to this case. We hold that it does.

The Surface Transportation Act of 1982, 96 Stat. 2097, encompasses a whistleblower protection provision for truck drivers who believed they suffered retaliation for reporting violations, refusing to commit violations, or participating in proceedings. 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 activity. 49 U.S.C.A. § 31105(a)(1). The STAA protects an employee who

makes a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." *Id.*

In administering the STAA's employee protection provision, the ARB had relied "on the burden of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws." *Coates v. Southeast Milk, Inc.*, ARB 05-050, ALJ No. 2004-STA-060, slip op. at 6 (ARB July 31, 2007); *see also* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982, 75 Fed. Reg. 53544, 53545 (Aug. 31, 2010) (setting out pre-2007 burden of proof standard for STAA complaints).

But Congress amended the STAA's burden of proof standard, on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b)(Thomson/West 2007)(AIR 21), which contains whistleblower protections for employees in the aviation industry. Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 75 Fed. Reg. 53545, 53550. The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii).

In their supplemental briefs, both parties argue that the 2007 burden of proof standard applies here. Salata Supplemental Brief at 1; City Concrete Brief at 8. We agree. The major administrative events in the course of this case occurred *after* August 3, 2007, the day that the 9/11 Commission Act, and the amendment to STAA's burden of proof was enacted. Indeed, City Concrete terminated Salata's employment on August 8, 2007, just five days after the STAA amendment was enacted. Salata filed his first complaint on August 10, 2007, and his second complaint on February 13, 2008.

It is well-settled that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction. . . to the contrary." *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974); *see also Gozlon-Peretz, v. United States*, 498 U.S. 395, 404 (1991). Since the STAA's 2007 amendments to the whistleblower provision had no expressed effective date, the amendments became effective on the date they were enacted. *See Johnson v. United States*, 529 U.S. 694, 702 (2000) ("[W]hen a statute has no effective date, . . . [it] takes effect on the date of its enactment."). Thus the 2007 STAA amendments apply to this case as the law in effect during the administrative proceedings below, and at the time of our initial decision.

B. Standard of Proof under the STAA

Under the 2007 amendments to the STAA, to prevail on his STAA claim, Salata must prove by a preponderance of the evidence that his complaints about his truck were protected activity; that his employer, City Concrete, took an adverse employment action against him; and that his protected activity was a contributing factor in the unfavorable personnel action. *Clarke* v. *Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4(ARB June 29, 2011), citing *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams*, ARB 09-092, slip op. at 5. Salata can succeed by "providing either direct or indirect proof of contribution." *Id.* "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id*. If Salata "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation" was a contributory reason for terminating his employment. *Id*. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id.* (citing *Riess*, ARB 08-137, slip op. at 6). If Salata proves pretext, we may infer that the protected activity contributed to the termination, although we are not compelled to do so. *Williams*, ARB 09-092, slip op. at 5.

If Salata proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, City Concrete may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams*, ARB 09-092, slip op. at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing BLACK'S LAW DICTIONARY at 577).

C. Salata failed to show that protected activity was a contributing factor to his termination

Applying the amended burden of proof standards, we find that there is substantial evidence in the record to support the ALJ's determination that Salata failed to show that protected activity was a contributing factor to any adverse action in violation of the STAA.

1. Salata failed to show that protected activity contributed to his termination in *Salata I*

While the ALJ found that Salata's reporting of problems with his truck constituted STAA-protected activity, the ALJ ultimately concluded in *Salata I* that this protected

activity was not a contributing factor to City Concrete's decision to terminate him. ALJ Decision I, slip op. at 16. While Salata questions the testimony of some witnesses in his supplemental brief, we find that there is substantial evidence in the record to support the ALJ's determination that City Concrete's decision to terminate Salata did not violate the STAA.

The record reflects that Salata had many problems associated with his performance and his relationship with customers that drove City Concrete's decision to terminate him. The problems that Salata had as a driver for City Concrete occurred during Salata's probationary period, when it is easier to terminate an employee for performance problems. *Id.* at 5 ("Mr. Annichenni testified that once past the probationary period, the union has a "three-strikes" requirement for terminating an employee and that, in his experience, it is very difficult and overly time-consuming to discharge a union employee even with very good cause."); *see also* Hearing Transcript (Tr.) at 213-215, 217.

The record also reflects that Salata experienced difficulty delivering concrete to the University site. ALJ Decision I at 7-8; *see also* Tr. at 228-229. During this job, Salata had problems getting his truck to deliver concrete to a site at YSU. ALJ Decision I at 7-8. Salata complained about the truck, and wrote up a DVIR, but he never submitted the report to the company. *Id.* at 8. This made Mr. Annichenni "skeptical" of Salata's complaint. *Id.*

There was also evidence that some of Salata's problems at City Concrete were apparently due to Salata's "lack [of] front-discharge truck experience he had claimed." *Id.* Annichenni had learned of an accident that Salata had in truck #425, where Salata, "[w]hile pulling out from receiving a load of concrete, had its rear-most wheels (drop axel) down causing it to clip a cement plant wall as he pulled away in a turn." *Id.* at 8-9; see also Tr. at 210, 264-265. This caused damage to the "fender, tire, and light." ALJ Decision I at 9. During this incident, Salata had not reported any problems with the truck. *Id.* Annichenni also noted "wet load' problems, and contractor job problems he had not previously been aware of" when he decided to terminate Salata. *Id.* at 8; see also Tr. at 266-267. Based on this information, Annichenni believed that Salata had "carelessness" issues." ALJ Decision I at 8; *see also* Tr. at 230-231. The record also reflects that a truck that Salata complained about, truck #509, even after the company performed repairs, was found by company workers to operate "fine." ALJ Decision I at 7-8.

Other evidence supported Annichenni's concerns about Salata's work at the company. The ALJ found that George Lesko, who worked for City Concrete as "batchman," testified that Salata complained about a wet load, e.g., that a batch of concrete had too much water. *Id.* at 9. Larry Gage, a driver at the site where Salata complained about the load, stated that the load was wet probably because Salata accidently left the water tank discharge valve on. Gage stated that he told Salata of the matter, and that Salata made an inappropriate statement in response. *Id.*

The ALJ found that the "proximity in time between [Salata's] complaint and termination raised the inference of a causal link between his protected activity and the adverse action of the employer," *id.* at 16, however the ALJ ultimately concluded that any protected activity that Salata engaged in was *not* a contributing factor for his termination in view of evidence of performance problems that Salata suffered during his probationary period. *See also Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ Nos. 2008-STA-043, -044 (ARB Dec. 18, 2009) (ARB affirms ALJ determination that complainant's protected activity did not contribute to the adverse action where complainant is fired because his brother threatened a company executive). Because substantial evidence supports the ALJ's conclusion, we affirm the ALJ's conclusion.

2. **Salata failed to show that he suffered any adverse action in *Salata II***

In *Salata II*, Salata claims that forged documents tainted his prior proceedings in violation of the STAA. On this issue we reiterate our holding in the prior decision that even if the RODS-VIOS documents were forged, these acts did not create an adverse action for which Salata can seek redress under the STAA. ARB Decision, slip op. at 9. "[T]his was an evidentiary issue that was taken up at the first hearing and was adequately raised and litigated in the first case." *Id.*, slip op. at 10; *see also* ALJ Decision II, slip op. at 4.

CONCLUSION

The 2007 amendment to STAA's burden of proof standard applies in this case. Applying that standard to the ALJ's findings of fact, we find that substantial evidence fully supports the ALJ's determination that Salata's protected activity did not contribute to his termination in *Salata I*, and that Salata failed to present material questions of fact to warrant a hearing in *Salata II*. The ALJ decisions below are **AFFIRMED** and the complaints are **DENIED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge