In the Matter of:

JEAN-PERRIE F. CARPENTIER,

COMPLAINANT,

v.

GOLDEN VALLEY TRANSFER, INC., and HELEN BAKER,

RESPONDENTS.

ARB CASE NO. 08-116

ALJ CASE NO. 2008-STA-045

DATE: February 26, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., *Truckers Justice Center,* Burnsville, Minnesota

For the Respondents:
Bryan T. Symes, Esq., *Seaton, Beck & Peters, P.A.*, Minneapolis, Minnesota

FINAL DECISION AND ORDER

Jean-Perrie Carpentier filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on January 7, 2008. He alleged that his employer, Golden Valley Transfer, Inc., and Helen Baker (collectively Golden Valley), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,[1] and its implementing regulations,[2] when Golden Valley

[1] 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009).

terminated his employment in retaliation for protected activities. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Carpentier's complaint on a motion for summary decision as he found that Carpentier failed to carry his burden of setting forth specific facts from which some issue of material fact could be discerned regarding whether he had engaged in any protected activity. We affirm.

BACKGROUND

Golden Valley, a commercial motor carrier engaged in transporting products on the highways hired the Complainant, Carpentier, on July 9, 2007.[3] Carpentier alleged that he made complaints related to violations of commercial motor vehicle safety regulations and refused to operate a vehicle because such operation would have violated commercial vehicle safety regulations.[4] He further alleged that Golden Valley discharged him in retaliation for his protected activities.[5]

Golden Valley alleges that it hired Carpentier contingent on passing a drug test that Carpentier indicated that he took, but later told Helen Baker, a Golden Valley employee, that he forgot to take.[6] It further alleges that Baker discharged Carpentier on July 16, 2007, as a consequence of Carpentier's failure to submit to drug/alcohol testing.[7]

Following an investigation, OSHA dismissed the complaint because the preponderance of the evidence showed that Carpentier did not engage in protected activity under the STAA, and that even if he had, it was not a contributing factor in Golden Valley's decision to terminate his employment.[8] Carpentier requested a hearing before an ALJ.[9]

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2 29 C.F.R. Part 1978 (2009).

3 Memorandum of Law In Support of Resp. Mot. for Summ. Dec. at 3; OSHA Findings at 1-2 (Apr. 4, 2008).

4 Comp. Pre-Hearing Statement at 1-3.

5 Comp. Pre-Hearing Statement at 3-4.

6 Memorandum of Law In Support of Resp. Mot. for Summ. Dec. at 3-4.

7 *Id.* at 4.

8 OSHA Findings at 3.

9 *See* 29 C.F.R. Part 1978.105(a).

The ALJ issued a Notice of Hearing that required that Carpentier file a Pre-Hearing Statement within thirty days of receiving the notice. After Carpentier failed to do so, the ALJ issued an Order to Show Cause why Carpentier should not be precluded from presenting witnesses or documentary evidence, other than his own testimony, at the hearing. In response, Carpentier requested an extension to submit his Pre-Hearing Statement because he had been having health problems including a heart attack. The ALJ granted the extension, on the condition that Carpentier submit a doctor's statement or other medical corroboration that he had debilitating health problems along with his Pre-Hearing Statement. Carpentier submitted his Pre-Hearing Statement without the required corroboration, although Carpentier's counsel explained in his attached declaration that he had been unable to reach Carpentier and that the situation could have been caused by his medical condition.

During discovery, Golden Valley served requests for admission upon Carpentier to which Carpentier never responded.[10] Thus, the ALJ issued an order deeming Golden Valley's requests for admissions conclusively established.[11]

The ALJ issued a Recommended Decision and Order (R. D. & O.) Granting Golden Valley's Motion for Summary Decision because he found that Carpentier did not carry his burden of setting forth specific facts from which some issue of material fact could be discerned regarding whether he had engaged in any protected activity. The ALJ did not consider Carpentier's Pre-Hearing Statement because he found that Carpentier's counsel's declaration was insufficient to satisfy his order requiring medical corroboration.

While the ALJ found that Carpentier did not meet his burden without considering the Pre-Hearing Statement and with Golden Valley's requests for admissions conclusively established, the ALJ also engaged in analysis considering the Pre-Hearing Statement and treating the requests for admissions as not established. Under this analysis, the ALJ also found that Carpentier did not engage in any protected activity and that no genuine issue of material fact existed as to protected activity.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) her authority to issue final agency decisions under the STAA.[12] The Board automatically reviews an ALJ's recommended STAA decision.[13] The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[14]

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10 R. D. & O. at 5.

11 *Id.*

12 Secretary's Order No. 1-2020 (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).

13 29 C.F.R. § 1978.109(c)(1).

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.[15] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[16] Therefore, the Board reviews the ALJ's conclusions of law de novo.[17]

We review an ALJ's recommended grant of summary decision de novo.[18] That is, the standard the ALJ applies also governs our review. The standard for granting summary decision is essentially the same as that found at Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue of material fact. We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[19] The determination of whether facts are material is based on the substantive law upon which each claim is based.[20] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[21]

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[14] 29 C.F.R. § 1978.109(c).

[15] 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich,* 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[16] 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

[17] *Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

[18] *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008). The ALJ properly converted the motion to dismiss to a motion for summary decision, 29 C.F.R. § 18.40 (2009), because he considered evidence contained outside of the pleadings. R. D. & O. at 2.

[19] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

[20] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[21] *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

When a motion for summary decision is made the party opposing the motion may not rest upon the mere allegations or denials of such pleading.[22] Rather, the response must set forth specific facts showing that there is a genuine issue of fact for the hearing.[23]

Although the Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order, only Golden Valley did so.

THE LEGAL STANDARDS[24]

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. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "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;" or who "refuses 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."[25]

In STAA cases the Board has adopted the burdens of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act.[26] Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination.[27]

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[22] 29 C.F.R. § 18.40(c).

[23] *Id.*

[24] We note that the ALJ, perhaps inadvertently, misstated the burden of proof under the STAA in stating that the complainant is required to prove his case by a preponderance of the evidence and subsequently stating that "a respondent may rebut *this prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason." R. D. & O. at 3 (emphasis added). We have set up the STAA burden of proof framework in the following section. We conclude that the ALJ's statement of the burdens is harmless error and that, in any event, he correctly applied the burdens. Thus, we conclude that the outcome of this action would not be any different had it had been correctly stated.

[25] 49 U.S.C.A. § 31105(a)(1).

[26] *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 6 (ARB July 31, 2007) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 13 (ARB May 24, 2007)).

[27] *Id.*

That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent was aware of this activity, that the respondent took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[28] Evidence of each of these elements raises an inference that the employer violated the STAA.[29]

If the complainant makes this prima facie showing the burden shifts to the employer to articulate a nondiscriminatory reason for the adverse action.[30] If the respondent identifies a nondiscriminatory reason, the complainant must then prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination.[31]

In proving that an employer's asserted reason for adverse action is a pretext, the employee must prove not only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. If the complainant does not prove one of the requisite elements, the entire claim fails.[32] The employee bears the ultimate burden of persuading the ALJ that the employer discriminated against him.[33]

Once the employee has proved by a preponderance of the evidence that the employer did act against him at least in part because he engaged in protected activity, the only means by which the employer can escape liability is by proving by a preponderance of the evidence that it would have taken the adverse action even in the absence of protected activity.[34]

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[28] *Id.*; *see also Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 4 (ARB Mar. 19, 2009) (citations omitted).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

[33] *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB No. 27, 2002)(citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993)).

[34] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Mourfield v. Frederick Plaas*, ARB No. 00-055, ALJ No. 1999-CAA-013, slip op. at 5 (ARB Dec. 6, 2002).

DISCUSSION

Analysis Not Considering Carpentier's Pre-Hearing Statement and Considering Golden Valley's Requests for Admissions as Conclusively Established

The ALJ did not admit Carpentier's Pre-Hearing Statement and deemed Golden Valley's First Requests for Admissions to be conclusively established. He noted that Carpentier's Brief in Opposition to Golden Valley's Motion for Summary Decision contained no exhibits, affidavits, or other supporting documentation. Based on the submissions, the ALJ concluded that Golden Valley was clearly entitled to summary decision because there was no genuine issue of material fact as to whether Carpentier engaged in any protected activity.

We agree with the ALJ that under this analysis, Golden Valley is entitled to summary decision. The requests to admit establish 1) that Carpentier was told that his employment with Golden Valley was conditioned on drug and alcohol testing, 2) that Carpentier told a Golden Valley employee that he had submitted to drug and alcohol testing, 3) that Carpentier did not inform anyone at Golden Valley that his work vehicle had safety problems, 4) that Carpentier did not inform anyone at Golden Valley that he was going to refuse to operate his vehicle due to a belief in a safety problem, 5) that Carpentier took his work vehicle for repair on July 13, 2007, as previously scheduled by Golden Valley, and that 6) Carpentier was discharged on July 16, 2007, and was told he was being discharged because he failed to submit to drug and alcohol testing.[35]

Since these facts were deemed admitted, there is no genuine issue of material fact as to Carpentier's engagement in protected activity and Golden Valley is entitled to summary judgment as a matter of law.

Analysis Considering Carpentier's Pre-Hearing Statement and Exhibits and Disregarding Golden Valley's Requests for Admission

The ALJ alternatively assessed whether there was any genuine issue of material fact as to whether Carpentier engaged in any protected activity using Carpentier's Pre-Hearing Statement as part of the record and not treating Golden Valley's First Requests for Admissions as conclusively established. We agree with the ALJ's conclusion that Golden Valley is entitled to summary decision as a matter of law under this analysis as well.

Upon reviewing Carpentier's Brief Opposing the Motion for Summary Decision, the undisputed facts are that Golden Valley scheduled Carpentier's truck for repair, Carpentier put the truck into the shop for repair as scheduled, and the windshield and tires were replaced.[36]

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35 Resp. Notice of Mot. and Mot. for Summ. Dec., Ex. A-2 (June 16, 2008).

36 Comp. Brief Opposing Mot. for Summ. Dec. at 2.

Carpentier did not deny that he failed to take a controlled substance/alcohol test or that he was told that he was fired for this failure; he merely asserted that Golden Valley's assertion that he was fired for failure to take the drug/alcohol test was suspect because it was Golden Valley's obligation to verify the test results before dispatching Carpentier.

Carpentier's Pre-Hearing Statement includes a vehicle inspection report (VIR) form completed on July 13, 2007, on which "Windshield" and "Out of Service" are written.[37] We agree with the ALJ that the VIR form does not represent protected activity. While we have found in the past that a VIR form can constitute protected activity,[38] it is not so in this case because Golden Valley scheduled repair work on the windshield of Carpentier's truck on July 11, 2007, two days before Carpentier completed the "windshield/out of service" VIR form on July 13, 2007. Golden Valley also notified Carpentier on July 11, 2007, that he should take the truck to the repair shop on July 13. Thus, rather than reporting safety issues to Golden Valley, Carpentier merely memorialized an issue that had been reported to him by Golden Valley.

Carpentier asserted that placing his vehicle in the shop for service was both a safety complaint and a refusal to operate a defective vehicle.[39] He stated that the vehicle had a defective windshield and tires.

The record shows that Golden Valley scheduled repairs to be made to Carpentier's vehicle and instructed Carpentier to take the truck to the shop at the end of the work day to have it repaired.[40] This does not constitute a refusal to drive because the truck was scheduled to be in the shop and was already out of service. Logically, an employee cannot refuse to drive a vehicle that an employer has already put out of service for repairs. It is of no moment that Carpentier apparently requested and received the additional repair of the tires;[41] this does not change the fact that Golden Valley had instructed him to deliver the truck for repair such that he could not refuse to drive it. There is no evidence in the record that Carpentier communicated a refusal to drive to Golden Valley; rather, he continued to drive the vehicle from the time he was told to take it for repairs on July 11, until he actually took it for repairs on July 13. Likewise, putting the truck in the shop for service does not constitute a complaint in this instance because he was instructed to do by his employer.

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37 Comp. Ex. 1.

38 *Schulman v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 99-015, ALJ No. 1998-STA-024, slip op. 6-7 (ARB Oct. 18, 1999).

39 Comp. Pre-Hearing Statement at 1-3; Comp. Br. in Opp. to Mot. for Summ. Dec. at 3.

40 Resp. Mot. for Summ. Dec., Ex. B.

41 Carpentier stated in his brief in opposition to the motion for summary judgment that the tires were replaced while the scheduled repair was for the windshield. Comp. Br. in Opp. to Mot. for Summ. Dec., at 2.

Viewing all of the evidence of record in a light most favorable to Carpentier, we find no evidence that Carpentier made any complaints regarding his vehicle's safety or refused to drive his vehicle. Thus, Carpentier has failed to show that a genuine issue of material fact exists as to whether he engaged in protected activity.

CONCLUSION

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined the evidence each party submitted. After viewing the evidence and drawing inferences in the light most favorable to Carpentier, the ALJ dismissed the complaint because Carpentier failed to show that a genuine issue of material fact exists regarding whether he engaged in protected activity. Since the record contains no evidence to show that Carpentier made a complaint regarding the safety of his motor vehicle or refused to operate his motor vehicle for any reason, the ALJ correctly applied the law and properly dismissed Carpentier's complaint. Thus, we **AFFIRM** his Recommended Decision and Order and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge