U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

YSAIAS VILLA, **ARB CASE NO 08-128**

COMPLAINANT, **ALJ CASE NO. 2008-STA-046**

v. **DATE: August 31, 2010**

D.M. BOWMAN, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
Julie A. Reddig, Esq., *Lerch, Early & Brewer*, Bethesda, Maryland

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

Ysaias Villa complains that D.M Bowman, Inc. violated the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010), and its implementing regulations, 29 C.F.R. Part 1978 (2009), when it fired him for refusing to violate federal hours of service regulations and for refusing to drive due to an unsafe condition. After a hearing on the merits, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on August 21, 2008, concluding that Villa did not prove a causal connection between his alleged protected activity and his discharge. Rather, Bowman fired Villa for abandoning his load without communicating with Bowman's dispatcher concerning schedule disruptions and maintenance problems. We affirm.

BACKGROUND

Villa began employment with Bowman on November 13, 2007. R. D. & O. at 2; Hearing Transcript (Tr.) at 21, 23. During orientation, Bowman provided Villa with its employee manual of policies and procedures, and instruction on the safe operation of its equipment. R. D. & O. at 2; Tr. at 64-65; Respondent's Exhibit (RX) 3. Bowman trained Villa on how to prepare logbooks, comply with federal regulations that limit driving hours, and communicate with the terminal through Bowman's voicemail system and onboard Qualcomm computer ("Qualcomm"). R. D. & O. at 2; Tr. at 65-68.

On January 28, 2008, Villa arrived at work at 8:00 a.m. His assigned truck was not ready. R. D. & O. at 2; Tr. at 27. Villa performed an inspection and determined that the truck needed minor repairs, which were completed between noon and 12:15 p.m. R. D. & O. at 2; RX 29. Villa then drove a load from Bowman's Williamsport, Maryland terminal to a customer in Frederick, Maryland. R. D. & O. at 2; Tr. at 28. He delivered that load and proceeded to Martinsburg, West Virginia to pick up another load. That load was not ready, and Villa had to wait three and a half hours to pick it up. R. D. & O. at 2; Tr. at 37-38. By then, it was 7:00 p.m., and the Martinsburg load had to be delivered in South Charleston, West Virginia, 300 miles away, by 6:00 a.m. R. D. & O. at 2; Tr. at 38-41.

Rather than start out for South Charleston and spend the night en route, Villa turned back. U.S. Department of Transportation hours of service regulations prohibit both driving more than 11 cumulative hours and being on duty more than 14 consecutive hours after an off-duty rest period of 10 consecutive hours. 49 C.F.R. § 395.3(a) (2009). Since Villa came on duty at 8:00 a.m., he could not have driven past 10:00 p.m., and at that point he would have to have taken a 10-hour break. Thus, he would not have arrived in South Charleston by 6:00 the next morning. R. D. & O. at 2-3; Tr. at 38-42. On the way back to the Williamsport terminal, Villa claimed the truck shook and he did not feel well. He left the truck in the terminal yard and went home for the night. R. D. & O. at 3; Tr. at 42-45.

Villa returned to work at 6:00 a.m. on January 29. He met with morning dispatcher Rob Holman and then terminal manager Dean Price, who questioned him about his failure to deliver the load to South Charleston. R. D. & O. at 3; Tr. at 45-47. After hearing his explanation, Holman and Price prepared a termination letter and presented it to Villa. The letter gave two reasons for his termination: Villa did not communicate with anyone that he was not delivering the load and that it would be late. If the tractor was not running properly, rather than contacting the shop, he could have caused damage by continuing to drive it. R. D. & O. at 3; Complainant's Exhibit (CX) 1.

Bowman's load manager, Jason Hood, testified. Allowing for time with customers, Villa should have been able to complete his assigned deliveries on January 28 within twelve hours and therefore without violating DOT hours of service regulations. R. D. & O. at 4; Tr. at 87-88. After obtaining directions to Bowman's customer in South Charleston, Villa informed the terminal he was leaving Martinsburg at 6:21 p.m. Bowman's dispatch heard nothing further from Villa that night. Even when he dropped the truck off at the terminal in Williamsport, which is always staffed, he informed no one. R. D. & O. at 4; Tr. at 102, 107.

Although Villa testified at the hearing that his truck was shaking, when he met with Price he claimed the engine was shutting off. If the engine had been shutting off, Price testified that it would have appeared on a company computer, and it did not. R. D. & O. at 4; Tr. at 141-43. Villa was terminated for the reasons stated in the letter. Villa failed to communicate his decision to return the truck to the terminal rather than continue the run to South Charleston. Bowman could have made other arrangements for the delivery that did not involve an hours of service violation. R. D. & O. at 4; Tr. at 106, 143-44. Further, it the truck was malfunctioning and Villa continued to drive it, he risked harming the engine. R. D. & O. at 4-5; Tr. at 142, 144-45.

Villa filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Bowman had discriminated against him because he engaged in protected activities under the STAA. On March 31, 2008, OSHA dismissed Villa's claim. Villa requested a hearing before an ALJ, which was held on June 19, 2008. The ALJ recommended denial of Villa's claim on August 21, 2008, and the case is now before us on automatic review. 29 C.F.R. § 1978.109(a). On appeal, Bowman filed a brief in support of the ALJ's decision. Villa did not file a brief.

DISCUSSION

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. 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). 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); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004). The ARB reviews the ALJ's conclusions of law de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

On August 3, 2007, Congress amended the STAA to include the legal burdens of proof under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) 49 U.S.C.A. § 42121 (Thomson/West 2007). Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007) codified at 49 U.S.C.A. § 31105(b)(1) (Thomson/West Supp. 2010) ("All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)."). Under § 42121(b) of AIR 21, a complainant must prove at the hearing stage that protected activity was a "contributing factor" in an adverse action prohibited under the statute. Furthermore, under AIR 21, now applicable to STAA, notwithstanding a finding that protected activity contributed to the adverse action, a tribunal may not award relief if the employer "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C.A. § 42121(b)(2)(B)(1), (4).

Under the STAA as amended, to prevail on his claim, Villa would have to prove by a preponderance of the evidence that: (1) he engaged in STAA-protected activity; (2) Bowman was aware of his protected activity; (3) Bowman subjected him to an adverse action, in this case

discharged him; and (4) Villa's protected activity was a contributing factor in the discharge. Furthermore, relief could not be ordered if Bowman proved by clear and convincing evidence that it would have discharged Villa even if he had not engaged in protected activity. *Cf. Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, -074, ALJ No. 2006-AIR-014, slip op. at 8 (ARB Sept. 30, 2009).

This case arose after the STAA was amended. Although the ALJ acknowledged that fact, it is not clear whether he applied the post-amendment burdens of proof. *See* R. D. & O. at 1, 5. However, substantial evidence supports his findings of fact and, upon application of the correct legal framework to his findings of fact, we agree with his ultimate conclusion.

We begin with the question of protected activity. As relevant to this case, the STAA protects a driver who refuses to drive in two situations: because driving would actually violate a regulation concerning commercial motor vehicle safety, or because the driver has a reasonable apprehension of serious injury and the employer does not correct the safety hazard. 49 U.S.C.A. § 31105(a)(1)(B), (2). Here, the ALJ assumed without finding that Bowman was directing Villa to violate the hours of service regulation, 49 C.F.R. § 395.3(a), when it expected him to make the delivery to South Charleston on January 28, and that Villa engaged in protected activity when he discontinued the run. However, the ALJ also correctly found that Villa did not qualify for protected activity under the "reasonable apprehension" section, since he never informed Bowman that he was refusing to continue driving to South Charleston, and therefore never gave Bowman an opportunity to take corrective action. R. D. & O. at 5 n.5; 49 U.S.C.A. § 31105(a)(1)(B)(ii), (2).

Because he assumed that Villa engaged in protected activity, the ALJ addressed whether his firing on January 29 was causally related to it. The ALJ held that Villa was discharged solely for the reasons stated in Hood and Price's testimony, and in the termination letter: because Villa did not communicate with Bowman that he was not delivering the load to South Charleston and was returning the truck to the terminal without telling anyone, and, if the truck was malfunctioning, continuing to drive it without contacting mechanics risked harm to the engine. R. D. & O. at 5. According to the ALJ, "The record lacks any evidence connecting [Villa's] termination to a refusal to violate DOT [Department of Transportation] hours-of-service regulations. . . . [Villa's] claim must fail." *Id.*

Substantial evidence in the record supports the ALJ's conclusion, although we state it in terms of whether Villa proved that his alleged protected activity was a "contributing factor" in his discharge. He did not. The dispositive evidence is undisputed. Villa informed the terminal he was leaving Martinsburg to South Charleston at 6:21 p.m. When it appeared that he could not complete the run that night, he did not seek instructions from Bowman dispatch about whether to stay over and make a late delivery, or that would have allowed Bowman to have another driver complete the load. Rather, he returned to the terminal in Williamsport, and informed no one, although it is always staffed. Moreover, he claimed that the tractor's engine was shutting off.

Continuing to drive it without contacting the shop risked permanent damage to the engine. Thus, Villa's claim that he would have violated the hours of service regulation was not a contributing factor in his termination. Accordingly, we **DENY** Villa's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge