In the Matter of:

GERALD LITT,

COMPLAINANT,

v.

REPUBLIC SERVICES OF SOUTHERN NEVADA,

RESPONDENT.

ARB CASE NO. 08-130

ALJ CASE NO. 2006-STA-014

DATE: August 31, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Dan M. Winder, Esq., *Law Office of Dan M. Winder, P.C.*, Las Vegas, Nevada

For the Respondent:
Kelly A. Evans, Esq., and Paul S. Prior, Esq., *Snell & Wilmer, L.L.P.*, Las Vegas, Nevada

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge;* Wayne C. Beyer, *Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Gerald Litt filed a complaint on March 26, 2006, with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that his former employer, Republic Services of Southern Nevada (Republic), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-

codified,[1] when it terminated his employment for making safety complaints about the trucks on which he worked.[2] 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. After a hearing, a Labor Department Administrative Law Judge (ALJ) recommended that Litt's complaint be dismissed as he failed to establish that Republic knew that he engaged in any protected activity or that Republic terminated his employment because he engaged in protected activity. We affirm the ALJ's decision as it is supported by substantial evidence.

BACKGROUND

Republic is a company located in Nevada involved in solid waste collection, transfer, and disposal. It operates commercial vehicles with a gross vehicle weight of 10,001 pounds or more on highways in interstate commerce.[3] Republic hired Litt in July 2004 to work on a collection truck as a "pitcher." His duties as a pitcher involved riding on a step on the back of a collection truck and collecting refuse from residential customers.[4]

On August 8, 2005, Republic terminated Litt's employment because he drove a collection truck without a commercial driver's license when he was still employed only as a pitcher.[5] A week later, Litt filed an anonymous safety complaint with OSHA on August 15, 2005, complaining that Republic employees riding on the back of collection trucks were exposed to the truck's exhaust which blew into their faces.[6]

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1 49 U.S.C.A. § 31105 (Thomson/West 2007). The STAA has been amended since Litt filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). The STAA amendment was signed on August 3, 2007. Noting that neither the plain language of the STAA amendment nor its legislative history signals a congressional intent for retroactive application, the United States Court of Appeals for the Eighth Circuit has held that this amendment is not applicable retroactively to complaints filed prior to August 3, 2007. *Elbert v. True Value Co.*, 550 F.3d 690 (8th Cir. 2008) (where Congress has not expressly prescribed a statute's reach, there is a presumption against retroactive application of legislation). Thus, because Litt's complaint arose, was filed, and adjudicated prior to the date of the STAA amendment, the amendment does not apply to this case.

2 *See* 49 C.F.R. § 392.2 (2009).

3 Hearing Transcript (HT) at 119-120.

4 HT at 148-149.

5 Respondent's Exhibit (RX) 46.

6 RX 5; *see also* HT at 46-47, 135-136.

Subsequent to his termination, Litt, along with co-worker Cornelius James, also met with Las Vegas City Councilman Lawrence Weekly and his chief-of-staff, Rickie Barlow, to discuss concerns they had about Republic.[7] Litt testified that they discussed the working conditions at Republic, as well as alleged violations of the collective bargaining agreement their union had with Republic and general safety problems they were experiencing with Republic's trucks.[8] Weekly then called the President of Republic's Las Vegas operations, Robert Coyle, to discuss the concerns Litt and James raised.[9]

On September 28, 2005, and October 5, 2005, Litt wrote anonymous e-mails to Republic's corporate offices in Florida to complain about abusive treatment he and other Republic employees received from his supervisor, Republic General Manager Joseph Knoblock, and alleged violations of the collective bargaining agreement.[10]

After his August 8, 2005 termination, Litt filed a grievance. As a result of his grievance, an arbitrator ordered Republic to reinstate Litt to his pitcher job on October 25, 2005.[11] After Republic reinstated Litt, he informed Knoblock that he had since received a commercial driver's license.[12] Knoblock then offered Litt a job driving a roll off truck, that involved delivering and picking up refuse containers from commercial customers, which Litt accepted.[13] As a driver, Litt filed vehicle condition and maintenance reports with Republic.[14]

On February 4, 2006, Litt was involved in an accident when he was driving a roll off truck under an overpass on an interstate highway and the boom on the truck collided with the overpass and was ripped off the truck.[15] Republic convened an "Accident Review Committee" on February 7, 2006, to investigate the accident and determine if Litt should be disciplined.[16] The committee consisted of Knoblock, Human Resources Director Hank Vasquez, and Safety

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7 HT at 130-132, 139, 207, 451-452.

8 HT at 140.

9 HT at 127-128, 144-145, 449-450.

10 RX 6; HT at 136.

11 Complainant's Exhibit (CX) 11.

12 CX 6.

13 *Id.*; HT at 57-58, 148.

14 CX 16.

15 RX 9; HT at 81, 471-478.

16 HT at 533-534, 560.

Director Dave Hefner.[17] The investigation concluded that Litt was negligent in failing to lower the boom on the truck and that the truck, valued at $70,000, was totaled.[18] In light of the severity of the accident and property damage, as well as Litt's negligence, Republic terminated Litt's employment on February 8, 2006.[19]

The next day, the union representing Litt filed a grievance on his behalf.[20] After meeting with union officials, Coyle denied Litt's grievance and the union informed Litt that it would not further pursue his grievance because it lacked merit.[21]

Litt filed his STAA complaint with OSHA on March 26, 2006. OSHA investigated the complaint and, on December 14, 2006, dismissed the complaint. Litt requested a hearing on his complaint before an ALJ. After a hearing, the ALJ issued his recommended decision on the merits of Litt's complaint on August 21, 2008.

The ALJ recommended that Litt's complaint be dismissed as he failed to establish that Republic or any of the decision-makers involved in his termination knew of his complaints or that he engaged in any protected activity. In addition, the ALJ determined that Republic presented evidence that it terminated Litt for a legitimate, nondiscriminatory reason as a result of the accident. Moreover, Litt failed to prove by a preponderance of the evidence that the reason Republic terminated Litt was not its true reason but was a pretext for discrimination. Thus, the ALJ denied Litt's complaint because he failed to prove by a preponderance of the evidence that Republic terminated his employment because he engaged in protected activity.

Litt appealed, and the Board issued a Notice of Review and Briefing Schedule permitting the parties to submit briefs in support of or in opposition to the ALJ's order and both parties timely filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA.[22] The Board automatically reviews an ALJ's

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17 *Id*.

18 HT at 477, 480.

19 RX 13; HT at 480, 558.

20 RX 14.

21 RX 14; HT at 301, 515.

22 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).

recommended STAA decision.[23] The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[24]

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.[25] Substantial evidence does not, however, require a degree of proof "that would foreclose the possibility of an alternate conclusion."[26] 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 . . . ."[27] Therefore, the Board reviews the ALJ's conclusions of law de novo.[28]

DISCUSSION

1. Legal Standards

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."[29]

To prevail on this STAA claim, Litt must prove by a preponderance of the evidence that he engaged in protected activity, that Republic was aware of the protected activity and took an

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[23] 29 C.F.R. § 1978.109(c)(1)-(2) (2009).

[24] 29 C.F.R. § 1978.109(c)); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

[25] 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. It means 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)).

[26] *BSP Trans, Inc.*, 160 F.3d at 45.

[27] 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

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

[29] 49 U.S.C.A. § 31105(a)(1).

adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[30] If Litt does not prove one of the requisite elements, the entire claim fails.[31] Litt bears the ultimate burden of persuading the ALJ that the employer discriminated against him.[32]

If Republic presents evidence of a nondiscriminatory reason for the adverse action, Litt must then prove by a preponderance of the evidence that the reason Republic offered was not its true reason but was a pretext for discrimination.[33] Once Litt has proved by a preponderance of the evidence that Republic did act against him at least in part because he engaged in protected activity, the only means by which Republic 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]

2. Analysis

A. Protected Activity and Adverse Action

Initially, the ALJ stated that as he found that Litt's complaint fails for other reasons, he would "assume without deciding" that Litt engaged in protected activity when he filed his August 2005 complaint with OSHA complaining about exposure to truck exhaust at Republic.[35] The ALJ further found that the routine vehicle condition reports Litt filed as a driver did not constitute protected activity and, even if they did, Litt's complaint fails for other reasons.[36]

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[30] *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

[31] *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).

[32] *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)).

[33] *Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 5 (ARB Mar. 19, 2009) (citations omitted).

[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).

[35] Recommended Decision and Order (R. D. & O.) at 25-26.

[36] *Id*. at 26.

Furthermore, Litt does not challenge the ALJ's finding that none of his other complaints constituted protected activity under the STAA.[37]

The ALJ did find that Litt suffered an adverse employment action when Republic terminated his employment and that Litt did not allege that he suffered any other adverse actions. We affirm the ALJ's finding in this regard as it is supported by substantial evidence.[38]

B. Causation

Next, the ALJ considered whether there was a causal relation between the adverse employment action and Litt's alleged protected activity. The ALJ initially found that, even assuming that the routine vehicle condition reports that Litt filed constituted protected activity, there is no evidence that any of the four decision-makers in Litt's termination from Republic (Knoblock, Vasquez, Hefner, and Coyle) had any knowledge of his reports.[39] We affirm this finding of the ALJ's as it is supported by substantial evidence and is unchallenged on appeal.

In regard to Litt's August 2005 OSHA complaint about exposure to truck exhaust, the ALJ noted that although officials at Republic learned of the complaint, it was made anonymously. Similarly, the ALJ noted that Litt made his e-mail complaint to Republic's corporate office anonymously.[40]

Although Litt testified that after his reinstatement he informed other Republic employees that he had filed his August 2005 OSHA complaint, the ALJ gave "little weight" to his testimony as it was inconsistent with his desire to remain anonymous when making his complaints to OSHA and Republic's corporate office after his original termination and prior to his reinstatement. In any event, the ALJ further found no evidence that any of these other Republic employees informed any of the decision-makers involved in Litt's termination that Litt had filed the complaint. Moreover, all of the decision-makers denied that they knew that Litt filed the OSHA complaint about exposure to truck exhaust.[41] Thus, the ALJ found that Litt failed to present sufficient circumstantial evidence to prove by a preponderance of the evidence that any decision-maker involved in his termination knew that he had filed the OSHA complaint or had complained about exposure to truck exhaust at all.[42]

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37 *Id* at 24.

38 *Id* at 26.

39 *Id*. at 27.

40 *Id*.

41 *Id*. at 14-15, 27.

42 *Id*. at 27.

Litt argues on appeal that because some of the decision-makers involved in his termination knew the August 2005 OSHA complaint had been filed and as Litt informed other Republic employees that he had filed the OSHA complaint, it is "implausible" that the decision-makers did not know that Litt filed the complaint. Instead, Litt asserts that is "reasonable to infer" that they did know. But the ALJ's finding that Litt offered no evidence that any of Republic's decision-makers involved in his termination knew of or were informed that Litt complained about exposure to truck exhaust or filed the OSHA complaint is supported by substantial evidence. Litt's mere assertions that it can be inferred that they did know he filed the complaint are not sufficient to constitute circumstantial evidence to establish that Republic was aware of Litt's OSHA complaint or alleged protected activity by a preponderance of the evidence, and we note that there is no presumption available under the STAA or its implementing regulations to establish this necessary element of his claim.[43]

Similarly, the ALJ found that neither Republic nor any of the decision-makers involved in his termination were informed or knew that Litt complained about Republic to Councilman Weekly.[44] Although Weekly called Coyle to discuss the concerns Litt raised about Republic, Litt, James, and Coyle all testified that Weekly did not mention Litt's name.[45]

In contrast, Weekly testified that when he called Coyle, he informed Coyle that Litt was in his office with him at the time.[46] However, when asked whether Weekly identified Litt when he called Coyle, Weekly's chief-of-staff Barlow testified "I believe so," but only recalled that he and Weekly were in the office when the call to Coyle was made.[47]

The ALJ credited the testimony of Litt, James, and Coyle that Weekly did not mention Litt's name to Coyle and gave little weight to the contrary testimony of Weekly and Barlow as he found that they were "vague and unresponsive."[48] We accord special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses."[49] This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court

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[43] Litt simply had to make his complaint about exposure to truck exhaust to one of the decision-makers without being anonymous prior to his termination, relying on the whistleblower protections available to him under the STAA, but the evidence does not establish that he ever did so.

[44] R. D. & O. at 19.

[45] HT at 128, 144-145, 449-450.

[46] HT at 548.

[47] HT at 72, 75.

[48] R. D. & O. at 16, 19.

[49] *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983); *Wainscott v. Pavco Trucking Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 4 (ARB Oct. 31, 2007).

look[s] only at cold records."[50] Thus, we affirm the ALJ's finding as it is unchallenged on appeal and is supported by substantial evidence.

Consequently, we affirm the ALJ's finding that Litt failed to establish by a preponderance of the evidence that Republic or any of the decision-makers involved in his termination knew that he engaged in any protected activity, a requisite element of entitlement, as supported by substantial evidence.

Even if Litt could establish that Republic knew that he engaged in protected activity, the evidence establishes that that Republic terminated Litt for a legitimate, nondiscriminatory reason as a result of his truck accident. Litt argues on appeal that his truck accident did not justify his termination because it did not involve intentional conduct, and he contends he was not at fault. Instead, Litt maintains an inference can be drawn that the accident was merely a pretext for Republic to terminate his employment because he engaged in protected activity. In this regard, Litt asserts that Republic did not conduct a mechanical inspection of the truck after the accident and had not outfitted the truck with a warning device to alert the driver that the boom was raised.

But the ALJ found that Republic terminated Litt for a legitimate, nondiscriminatory reason. The ALJ noted that the conclusion of the "Accident Review Committee" investigation, as well as the reason Republic provided in Litt's termination letter and during Litt's grievance proceeding, all stated that the reason for Litt's termination was his truck accident. Thus, the ALJ found that Republic met its burden to present evidence that it terminated Litt for a legitimate, nondiscriminatory reason.[51] We affirm the ALJ's finding as it is supported by substantial evidence.

In addition, the ALJ found that Litt failed to prove by a preponderance of the evidence that the reason Republic terminated Litt was not its true reason but was a pretext for discrimination. Specifically, the ALJ found that Litt did not show that similarly situated Republic employees or drivers who had not engaged in protected activity were treated better. Instead, the ALJ found that Litt merely established that Republic had routinely terminated

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[50] *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991). The Board generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable." *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004). In weighing the testimony of witnesses, the ALJ as fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006) (citations omitted). In situations where both parties provide substantial evidence for their positions, the Board will uphold the ALJ's findings. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 14 (ARB June 29, 2006).

[51] R. D. & O. at 28; *see also* RX 13-14; HT at 477, 480, 558.

drivers for similar or worse accidents involving a similar amount of property damage.[52] We affirm this finding as it is supported by substantial evidence.[53]

Moreover, the ALJ found that Republic used an appropriate and fair process in investigating Litt's truck accident and applied established non-retaliatory criteria in determining whether Litt should be terminated. The ALJ noted that Republic formed an "Accident Review Committee" to investigate the incident, composed of managers with different experience, including the Director of Human Resources, the Director of Safety, and the General Manager Knoblock who has mechanical experience.[54] The committee considered the opinions of mechanics who inspected the truck, conducted their own inspections of the truck, and applied the established criteria for discipline in such cases, including the severity of the accident, its preventability, and the longevity of the driver's employment.[55] The committee concluded that in light of the severity of the accident that totaled the truck, the fact that Litt was a short-term employee, and was negligent in leaving the boom up, Litt should be terminated.[56] Furthermore, the ALJ noted that Litt was permitted to seek an objective review of the committee's determination through the grievance procedure.[57]

Although Litt argued that Republic did not conduct a mechanical inspection of the truck or outfit the truck with a warning device, the ALJ the properly noted that the relevant inquiry is not whether Republic's reason for Litt's termination (because he was negligent or at fault) ultimately proves true, but whether Republic's perception justified the termination or instead its reason was pretextual.[58] As the ALJ's finding that Litt failed to prove by a preponderance of the evidence that the reason Republic terminated Litt was not its true reason but was a pretext for discrimination is supported by substantial evidence, we affirm the ALJ's finding.

C. Other Issues

Litt also contends on appeal that the ALJ denied him due process at the hearing in overruling hearsay objections and allowing hearsay evidence into the record. As the ALJ acknowledged in his R. D. & O., he was under a "mistaken impression" when he indicated at the hearing that formal rules of evidence did not apply, as he noted that they do not apply in

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52 R. D. & O. at 28-29.

53 *See* R. D. & O. at 20-21; HT at 25, 313-318, 404-407.

54 R. D. & O. at 29-30.

55 R. D. & O. at 30.

56 *Id.*; *see* R. D. & O. at 8-9; RX 9, 13; HT at 275-276, 472-478, 485, 501, 533-534, 560.

57 R. D. & O. at 30; *see* R. D. & O. at 10-12; RX 14, 44.

58 R. D. & O. at 31; *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987).

whistleblower complaint cases arising under other statutes.[59] Thus, the ALJ overruled Republic's initial hearsay objection at the hearing and allowed Litt to testify regarding what he said was a "safety issue" he had raised with Knoblock.[60]

But the STAA's implementing regulations specify that hearings will be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings[61] and under these rules, hearsay evidence is inadmissible.[62] The ALJ did not believe, however, that his error discouraged the parties from raising further hearsay objections at the hearing, as he nevertheless permitted counsel to make hearsay objections at the hearing.[63]

The ALJ noted that Litt made no hearsay objections at the hearing, but Republic continued to make hearsay objections throughout the hearing.[64] Specifically, Republic objected to Litt's testimony as hearsay regarding his truck accident when he indicated that he had spoken to an employee of the manufacturer of the boom on his truck regarding a problem with how the boom could raise on its own.[65] The ALJ noted the objection at the hearing and ultimately sustained it in his R. D. & O. because Litt was providing a layperson's unqualified and untrustworthy explanation of an expert's opinion.[66]

But Litt asserts that the ALJ nevertheless allowed hearsay testimony from Knoblock regarding whether OSHA had found any violations as a result of Litt's OSHA complaint[67] and allowed hearsay evidence to be entered into the record, which was contained in Republic's investigation report of his truck accident. Thus, Litt contends that the ALJ's error denied him due process. Moreover, Litt argues that the ALJ erred in allowing hearsay evidence and that the ALJ's delay in ruling on one of Republic's hearsay objections until issuing his R. D. & O. constituted prejudicial error.

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59 R. D. & O. at 6-7, n.15.

60 HT at 49-52.

61 29 C.F.R. § 1978.106(a); *see also Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 9-10 (ARB Oct. 31, 2007).

62 29 C.F.R. § 18.802.

63 HT at 52.

64 R. D. & O. at 7, n.15.

65 HT at 570.

66 R. D. & O. at 6-7, n.15.

67 *See* HT at 464-465.

None of this alleged hearsay evidence is relevant, however, to determining whether Republic knew that Litt engaged in any protected activity or that the reason Republic terminated Litt was a pretext for discrimination, requisite elements of entitlement. Moreover, Litt does not point to any other evidence that the ALJ may have failed to properly consider that would be relevant in making those determinations. In any event, the ALJ acknowledged his error in his R. D. & O. and the only substantive hearsay objection, which the ALJ considered also was not relevant to making those determinations. Thus, as the ALJ's findings that Litt failed to establish that Republic had knowledge that Litt engaged in any protected activity or that the reason Republic terminated Litt was a pretext for discrimination are supported by substantial evidence, any error by the ALJ in this regard would not be relevant to or affect the outcome of the case and is, therefore, harmless.

Finally, Litt contends the ALJ erred in finding that Litt lacked credibility regarding the length of his incarceration for a prior felony conviction. Litt offers new evidence in an appendix attached to his brief on appeal to show that his testimony in this regard was accurate.[68]

But the ALJ held that Litt's testimony regarding his criminal history did not provide any reason for rejecting his testimony regarding his case on the merits unless there was other "convincing evidence bringing it into question."[69] Moreover, Litt's testimony regarding his criminal history is not relevant to whether Litt established that Republic knew that Litt engaged in any protected activity or that the reason Republic terminated Litt was a pretext for discrimination. Thus, we need not address this issue.

CONCLUSION

Substantial evidence supports the ALJ's finding that Republic took adverse action against Litt when it terminated his employment. But substantial evidence also supports the ALJ's findings that Litt failed to establish by a preponderance of the evidence that Republic knew that he engaged in any protected activity and that the reason Republic terminated Litt was not its true reason but was a pretext for discrimination, requisite elements of entitlement. Thus, substantial evidence supports the ALJ's finding that Litt did not establish by a

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[68] We decline to consider this new evidence on appeal. When deciding whether to consider new evidence, the Board ordinarily relies upon the standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2009), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c); *see, e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-015, Order Denying Stay, slip op. 5-6 (ARB June 9, 2006). Litt has not established that his new evidence was not available at the time of the ALJ's consideration of his case. Therefore we will not consider it in our review.

[69] R. D. & O. at 24-25, n.42.

preponderance of the evidence that Republic terminated him due to his protected activity. Consequently, the ALJ's determination that Litt was not subjected to discrimination in violation of the STAA and his R. D. & O. dismissing Litt's complaint are **AFFIRMED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge