In the Matter of:

NAOMI CLARKE, **ARB CASE NO. 09-114**

COMPLAINANT, **ALJ CASE NO. 2009-STA-018**

v. **DATE: June 29, 2011**

NAVAJO EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Naomi Clarke*, pro se*, Colorado Springs, Colorado

For the Respondent:
Nancy Cornish Rodgers, Esq., *Kissinger & Fellman, P.C.*, Denver, Colorado

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and 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, as amended and recodified. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010). The complainant, Naomi Clarke, a truck driver, alleged that her employer, Navajo Express, Inc. (Navajo), violated STAA when it terminated her employment after she complained that contamination was entering the cab of her assigned truck from the heating ventilation and air condition (HVAC) system. 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 an investigation by the Occupational Safety and Health Administration (OSHA), which denied relief, Clarke requested a hearing before an Administrative Law Judge (ALJ). After holding a hearing, on June 23, 2009, the ALJ issued a Recommended Decision and Order (R. D. & O.) finding that Navajo violated the STAA, and awarding Clarke remedies. We conclude that substantial evidence supports the ALJ's findings of fact, and we agree with his conclusions of law. We thus affirm the ALJ's R. D. & O., and the relief awarded.

BACKGROUND

Clarke began working as a truck driver for Navajo in July 2006. Transcript (Tr.) at 52 (Clarke). Around October 2007, she began to notice unknown particles entering the cab of her truck through the vents of the HVAC system. Tr. at 62 (Clarke). During this time, she also began to experience symptoms that appeared like an allergic reaction. Her eyes burned, she had post-nasal drip, and skin irritations. Tr. at 63 (Clarke); CX 2 at 1. The particles landed on the instrument panel as she drove. CX 2 at 2. She cleaned the areas regularly, but the particles continued to emanate from the HVAC system and reappear within a couple of hours after cleaning. CX 2 at 2. Clarke's physical symptoms continued to worsen into the winter months, as particles continued to enter the cab of her truck. CX 2 at 2-3. Her symptoms lessened when she was away from the truck. CX 2 at 2.

On December 7, 2007, Clarke notified Navajo that particles in the HVAC system were irritating her eyes, throat, and lungs. Tr. at 63 (Clarke); RX A. Navajo serviced the truck the next day, and removed two cubic feet of insulation situated on the engine that was blocking air flow to the HVAC system. RX A; CX 2 at 3; Tr. at 66-67 (Clarke). Clarke resumed driving the truck, but her symptoms became worse, and her skin became irritated. CX 2 at 3. Clarke believes that her symptoms dramatically worsened because removing the insulation left the particles unobstructed and free to enter the cab while she drove. CX 2 at 3.

On December 10, 2007, Clarke notified a Navajo dispatcher that particles continued to enter the cab of the truck causing her greater discomfort. RX B at 1. The dispatcher responded: "[T]hat is hard to believe you not telling anybody about it if it has been that long." RX B at 11. The truck was cleaned and a new filter installed for the HVAC system. RX C at 3. The technician working on the truck described the particles as "fiberglass dust" and stated in correspondence to Navajo that it caused him to "start[] itching." RX C at 3; see also Tr. at 75-76 (Clarke).

Clarke's symptoms continued despite the new filter. CX 2 at 5; Tr. at 69-71 (Clarke). On recommendation from Navajo's manager, Jeri Bolt, Clarke went to the emergency room where a physician diagnosed her symptoms as seasonal allergies, but recommended that Clarke see her own physician for testing. RX E at 2-3, 5; Tr. at 73-74, 76-78 (Clarke).

On December 14, 2007, Clarke notified Navajo that fiberglass particles continued to blow into the cab of her truck. She told Navajo Vice President of Safety, Larry Barker, and Navajo Director of Human Resources, Tom Hrgich, that she thought the truck was fit to drive but only after further repairs, and told them that she continued to feel sick. CX 3 at 1; Tr. at 86-87 (Clarke).

On December 17, 2007, Clarke saw a physician at Navajo who was there to do physical examinations for new hires. Tr. at 92-93 (Clarke); CX 3 at 2. The physician and Bolt agreed that Clarke's medical diagnosis was a "possible chemical-induced skin rash [and] pulmonary symptoms." CX 3 at 2; Tr. at 94 (Clarke). While the physician identified "no significant pathology," he referred Clarke to National Jewish Hospital National Asthma Center for evaluation. RX H at 1; Tr. at 94-96 (Clarke) (Clarke testified that the doctor told her to "keep note, get [a] sample of the stuff so when you go to National Jewish they can evaluate it and know what they . . . need to treat [you for].").

On December 18, 2007, Clarke went to Navajo's offices to get a copy of the physician report, to arrange to make an appointment at National Jewish Hospital, and to get samples of debris from her truck. CX 3 at 3; Tr. at 98 (Clarke). When she arrived, Barker informed her that Navajo would not cover the cost of any appointments at National Jewish Hospital, and would not allow her to get debris samples from the truck. Tr. at 99, 103 (Clarke); RX at I, Barker Aff. ¶ 13; RX N, Harris Aff. ¶ 10. Barker did not believe that there was debris in the truck that was making her sick (RX I, BarkerAff. ¶ 9; RX N, Harris Aff. ¶ 10), or that her symptoms were work-related (Tr. at 159-161 (Barker)). After a "heated" discussion between Clarke, Barker, and other Navajo managers, Clarke was told to leave the property until the company concluded an air quality test. Tr. at 161, 167 (Barker); Tr. at 110-112 (Clarke).

On December 19, 2007, an air quality test showed nothing abnormal in the cab or the blower system. RX at G. The next day, December 20, 2007, Navajo instructed Clarke to retrieve her personal items from the truck and terminated her employment. Tr. at 190, 192 (Hrgich).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board automatically reviews STAA decisions issued on or before August 31, 2009. 29 C.F.R. Part 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 Corporation-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. *Ibid*. 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

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." *Ibid.*

To prevail on her STAA claim, Clarke must prove by a preponderance of the evidence that her complaints about the HVAC system were protected activity, that Navajo was aware of Clarke's complaints and took an adverse employment action against her, and that Clarke's protected activity was a contributing factor in the unfavorable personnel action. *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. Clarke can succeed by "providing either direct or indirect proof of contribution." *Ibid.* "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Ibid*. If Clarke "does not produce direct evidence, [s]he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating h[er] employment." *Ibid*. "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." *Ibid.* (citing *Riess*, ARB 08-137, slip op. at 6). If the complainant 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 Clarke proves by a preponderance of evidence that her protected activity was a contributing factor in the unfavorable personnel action, Navajo 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).[1]

[1] The ALJ used a "dual motive analysis" stemming from the burden-shifting standard employed under Title VII pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See* R. D. & O. at 8, citing *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (relying on burden-shifting analysis of *McDonnell Douglas* in STAA retaliation case). This burden of proof standard was amended 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 AIR 21, 49 U.S.C.A. § 42121(b)(Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry. Under that standard, complainants

A. *Clarke's Protected Activity*

Following a hearing, the ALJ determined that Clarke engaged in protected activity because she "informally communicated her health and safety concerns" to Navajo and her complaint "related to the commercial motor vehicle standards" under 44 C.F.R. § 393.77(a)(4)(2008). R. D. & O. at 6. This determination is fully supported by substantial evidence.

1. Clarke communicated health and safety concerns to Navajo

The ALJ found that Clarke expressed complaints related to the operation of her truck that adversely affected her health and safety. Specifically, the record shows that Clarke complained to Navajo that: (1) on December 7, 2007, the debris in the truck's heating system was hurting her eyes, throat, and lungs, and even after attempted repairs her symptoms intensified, including irritation on her skin (R. D. & O. at 2-3); (2) on December 10, 2007, particles were continuing to enter the truck's cab and the particles were hurting her eyes, throat, and lungs (*id.* at 3); (3) on December 11, 2007, her symptoms persisted despite a new air filter installed in her truck and she needed time to recuperate (*ibid.*); and (4) on December 14, 2007, fiberglass dust continued to blow on her while she drove the truck (*ibid.*). *See also* CX 2 at 5, CX 5; RX A (Clarke submitted "Driver's Request for Work" that "something is in my air ducts that's hurting my eyes and throat, and lungs"); RX B at 1; RX D; RX F. *See also* Tr. at 60-63, 64-65, 67-68, 70-74 (Clarke). Despite attempts at repairing the truck, the ALJ found, and the record reflects, that Clarke continued to feel ill when driving the truck. R. D. & O. at 3, citing CX 3 at 1; *see also* Tr. at 126-127 (Clarke); RX B, RX C.

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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* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53545, 53550 (Aug. 31, 2010). 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; *see also id.* at 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii). The failure of the ALJ to employ in this case the standard the 9/11 Commission Act adopted, however, is harmless error because the "contributing factor" standard that the complainant is required to meet is a lesser burden of proof than that which the ALJ used, and the "clear and convincing evidence standard [required of the employer] is a higher burden of proof than the preponderance of evidence standard." 75 Fed. Reg. 53550. "In the review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowan*, 302 U.S. 238, 245 (1937). Since in this case the ALJ's findings of fact are supported by substantial evidence, and the 2007 STAA amendment employs a lesser burden of proof for complainants and a higher burden of proof for employers, the result would be no different even had the ALJ employed the correct legal standard. *See Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result); *Knight v. Mills*, 836 F.2d 659, 661 n.3 (1st Cir. 1987) ("It is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground.").

Based on this evidence, the ALJ determined that Clarke effectively communicated health and safety concerns to Navajo with respect to the company truck that she was assigned to operate. The ALJ determined that, despite Clarke's complaints, Navajo made "minimal effort to investigate the health problems described by [Clarke]." R. D. & O. at 7. Indeed, the record reflects that Navajo did little more than clean out the cab of the truck and install a new air filter for the HVAC system. *See* RX C at 1-3; Tr. at 164, 166-167 (Barker); RX N, Harris Aff. ¶ 9 (stating that truck was "fine" because "a new air filter was installed and all the debris was cleaned out from the HVAC unit"); see also R. D. & O. at 3. The ALJ concluded that Navajo's minimal efforts appeared to be based on the company's refusal to believe that Clarke's health problems were work-related. R. D. & O. at 7; *see also* Tr. at 159-160 (Barker). For instance, as the ALJ found, Navajo "even refused to allow complainant to procure samples of the alleged harmful substance in order to facilitate full diagnosis of her persistent health symptoms." R. D. & O. at 7; Tr. at 102-107, 139-142 (Clarke). Substantial evidence fully supports these findings.

2. Clarke's activity was protected because she expressed safety concerns related to commercial vehicle standards

Navajo contends that there is insubstantial evidence to support the ALJ's determination that Clarke's complaints related to a motor vehicle safety violation.

Federal Motor Carrier Safety Administration regulations proscribe "heaters permitting air contamination." 49 C.F.R. § 393.77(a)(4). Specifically, 49 C.F.R. § 393.77(a)(4) prohibits "[a]ny heater taking air, heated or to be heated, from the engine compartment or from direct contact with any portion of the exhaust system; or any heater taking air in ducts from the outside atmosphere to be conveyed through the engine compartment, unless said ducts are so constructed and installed as to *prevent contamination of the air so conveyed by exhaust or engine compartment gases*" (emphasis added). Section 393.77(a)(4) essentially prohibits unsealed heating systems, and there is ample evidence supporting the ALJ's determination that Clarke's "concern over particles entering the truck's cab through the HVAC system implicates the safety concerns expressed and remedial efforts mandated by [the regulation]." R. D. & O at 7. The record shows that the HVAC system for Clarke's assigned Navajo truck seeped particles from the truck's engine into the cab of the truck. *See* CX 2 at 3, CX 5; RX A, RX B at 1, RXC at 3. Moreover, in a letter to Navajo, a truck service manager who inspected Clarke's truck found fiberglass debris that was seeping into the cab, RX C at 3, and Clarke wrote in her notes that the particles continuously built up on her truck's instrument panel within a few hours after she cleaned the panel, CX 2 at 2. *See also* RX B at 1; CX 2 at 1.

Based on this evidence, the ALJ found that Navajo's "HVAC system was not, evidently, sealed against contamination from insulation particles and the potentially other unknown pollutants originating from the truck's engine compartment." R. D. & O. at 7. The ALJ determined that Clarke's complaints about the particles "infiltrating her truck's HVAC system c[ame] within the purview of 49 C.F.R. 393.77(a)(4) as a result." *Ibid*. The ALJ further found that Clarke's "extensive descriptions of her ailments and symptoms were . . . an indicator of the severity of the contamination emanating from the HVAC system." *Ibid*. The ALJ's determination that Clarke engaged in protected activity when she complained about the company's truck's HVAC system is supported by substantial evidence of record.

3. Clarke's complaints about health and safety problems posed by the faulty HVAC system contributed to her termination, and there is no clear and convincing evidence that Navajo would have terminated her absent her complaints

While Navajo contends that its decision to terminate Clarke was directly related to her behavior at a December 18, 2007 meeting to discuss her health complaints, the ALJ determined that there was a causal link between Clarke's complaints over her health and safety while driving the company's truck and Navajo's decision to terminate her employment. R. D. & O. at 8-9. The ALJ determined that Navajo terminated Clarke's employment in part because she engaged in protected activity, and in part because she engaged in objectionable behavior on her last day on the job. *Id. at* 9. There is substantial evidence to support the ALJ's decision that Clarke's complaints about the particles in her cab contributed to her termination, and that despite the "heated discussion" that ensued between her and Navajo managers, there is no clear and convincing evidence showing that Navajo would have terminated her employment absent her complaints about her cab and her subsequent need to see a doctor. See *supra* n.1.

The ALJ found that at a December 18, 2007 meeting between Clarke and two Navajo managers, a heated discussion occurred when the managers told Clarke that the company would not cover the cost for her to be seen by doctors at National Jewish Hospital's National Asthma Center. R. D. & O. at 4; *see also* Tr. at 161-162 (Barker). The managers also refused to allow Clarke to collect her personal items from the truck, or to procure samples of fiberglass particles. Tr. at 161-162 (Barker). The discussion between Clarke and the managers "became heated over these points, and the combative discussion went on for forty five minutes." *Ibid.* The ALJ found that Clarke's objectionable behavior, however, did not preclude her from STAA protection because it was incidental to the protected activity. R. D. & O. at 9. Based on the evidence, the ALJ reasonably concluded that Navajo "terminated [Clarke's employment] as a result of her demand for [Navajo] to recognize an ailment that resulted directly from a violation of a federal commercial motor vehicle safety standard," e.g., the fiberglass particles and dust entering the cab from the engine. R. D. & O. at 9; *see also supra* at 3 (Clarke testimony); CX 2 at 3, CX 5; RX A, RX B at 1, RXC at 3. Further, the ALJ found that even considering Clarke's objectionable behavior, Navajo failed to show that it would have taken the same adverse action absent Clarke's protected activity. R. D. & O. at 9. Therefore, substantial evidence fully supports the ALJ's finding that Navajo terminated Clarke's employment because of her complaints about dust particles in the cab of her truck, which is protected activity under STAA.

B**.** *Clarke's remedy*

On appeal, Clarke asserted that Navajo has not reinstated her into the same job that she had before as the ALJ ordered it to do. Comp. Br. at 1; R. D. & O at 10. She asserts that Navajo has not given her the same hours that she had previously or adequate provision for time off of work such that Navajo has created conditions that prevent her from working for them. Once an ALJ determines that an employer has violated STAA, the employee is to be immediately reinstated to his or her former position with the same pay, terms, conditions and privileges of his/her prior employment. 49 U.S.C.A. § 31105(b)(3)(A); 29 C.F.R. § 1978.109(d). It is fully expected that an employer will fully comply in this regard, lest the employer be subject to a

resulting award of punitive damages pursuant to section 31105(b)(3)(C) should the complainant be forced to seek relief through a civil enforcement action under section 31105(e).[2] Accordingly, should Navajo fail to fully comply with the ALJ's order as herein affirmed, Clarke should direct any concerns about Navajo's compliance with the ALJ's reinstatement order to the OSHA office that investigated her initial complaint to request civil enforcement by the Secretary of Labor. *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, ALJ No. 2009-STA-049, slip op. at 11 n.69 (ARB Apr. 28, 2011).

CONCLUSION

For the foregoing reasons, the ALJ's R. D. & O. is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

[2] 49 U.S.C.A. § 31105(b)(3)(e) provides: "If a person fails to comply with an order issued under subsection (b) of this section, the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred." *See also* 29 C.F.R. § 1978.113.