In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY

and

TIMOTHY J. BAILEY,

COMPLAINANT,

v.

KOCH FOODS, LLC,

RESPONDENT.

ARB CASE NO. 10-001

ALJ CASE NO. 2008-STA-061

DATE: September 30, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Charles F. James, Esq.; Tremelle I. Howard-Fishburne, Esq.; Channah S. Broyde, Esq.; Stanley E. Keen, Esq.; Carol A. De Deo, Esq.; *United States Department of Labor,* Washington, District of Columbia.

For the Respondents:
Larry Stine, Esq., and Elizabeth K. Dorminey, Esq., *Wimberly, Lawson, Steckel, Schneider & Stine, P.C.,* Atlanta, Georgia.

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Timothy Bailey filed a complaint under the whistleblower protection provision of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011)(STAA), and its implementing regulations at 29 C.F.R. Part 1978, 75 Fed. Reg. 53544 (Aug. 31, 2010). He alleged that his former employer, Respondent Koch Foods, LLC, suspended and then fired him in retaliation for refusing to haul a trailer he believed violated state and federal statutes regarding the weight of tractor-trailers and because he believed hauling the trailer could result in an accident and personal injury. The STAA protects from discrimination covered employees who, among other things, report violations of commercial motor vehicle safety or security regulations or refuse to operate a vehicle when such operation would violate commercial motor vehicle safety rules or because the employee has a reasonable apprehension that driving the vehicle would result in serious injury to himself or the public. 49 U.S.C.A. § 31105(a)(1)(A),(B).

Bailey initiated his complaint with the Occupational Safety and Health Administration (OSHA) on August 31, 2007. OSHA found that Koch Foods terminated Bailey's employment in violation of Section 31105(a)(1)(B) and recommended reinstatement and the award of back pay. In response, the Respondent filed objections and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). After a hearing on the merits, the presiding ALJ issued a Recommended Decision and Order (R. D. & O.) on September 29, 2009, finding that Bailey established that Koch Foods discriminated against him in violation of the Act when it terminated his employment and that Koch Foods did not show that it would have terminated him in the absence of his protected activity. The ALJ recommended that Bailey be reinstated, but noted that he had secured alternative employment and did not want to return to his position at Koch Foods. Thus, the ALJ awarded back pay from July 27, 2007, to December 22, 2007, and to reflect Bailey's reduced salary at the alternative employment, he awarded $339.24 per week from December 23, 2007, to August 25, 2008, the date Koch Foods offered Bailey reinstatement plus interest. In addition, the ALJ awarded $8,000 in compensatory damages.

The Respondent filed a timely appeal of the ALJ's Recommended Decision and Order with the Administrative Review Board. For the reasons that follow, we affirm the ALJ's decision.

BACKGROUND

Tyson Foods operated a chicken processing plant located in Gadsden, Alabama. Bailey began driving for Tyson in 2003. He continued working at the plant when Koch Foods purchased it in May 2007. Bailey's job required him to bring an empty trailer from the plant to a farm and exchange it for a trailer that was loaded with chickens ready to be taken to the plant. Alabama state law limits the weight of the tractor-trailers Bailey drove to 80,000 pounds, with a

ten percent margin so that a trailer must be over 88,000 pounds before the driver can be ticketed. R. D. & O. at 14. In addition, federal law imposes a weight limit of 80,000 pounds on vehicles traveling on the interstate highways. 23 U.S.C.A. § 127(a) (West 2002 & Supp. 2011).

When Koch Foods purchased the plant, it added three new trailers to the company's fleet. On July 16, 2007, Bailey learned that in three instances, the new trailers, loaded with chickens, exceeded the state and federal weight limits. R. D. & O. at 15; Hearing Transcript (Tr.) at 19. On July 25, 2007, Bailey pulled a new trailer that exceeded the interstate limit by more than 4,000 pounds. Koch Foods did not inform Bailey that it had instructed the chicken catchers to lighten the loads. Bailey testified that other drivers had told him that the trailers were occasionally overweight. R. D. & O. at 3; Tr. at 20. He explained that the trailers were longer than the original trailers in the fleet and that they had thicker frames. Tr. at 18-19. The weight tickets submitted as evidence corroborate Bailey's testimony regarding the weight of the trailers. R. D. & O. at 15; Government Exhibits (Gov. Ex.) 1-3.

On July 26, 2007, Bailey started his shift at 6:00 p.m. He arrived at a designated farm with an empty trailer to leave at the farm, where he was to pick up a trailer that was pre-loaded with chickens to be hauled to the processing plant. When he saw that the trailer waiting to be hauled was one of the newer trailers, he decided not to haul the trailer back to the plant because he was concerned that it was overweight, just like the trailer he had pulled the day before. He called a co-worker and informed him that he would not haul the trailer. He then waited while the workers at the farm filled the empty trailer he had driven to the farm from the plant.[1] Because his shift ended late that night, Bailey waited to call his supervisor, Tim Graul, until 6:00 a.m. the next morning to inform him that he had refused to haul a trailer due to his concern that the trailer was overweight. Later the same day, Graul called to tell Bailey to appear at his office the following Monday, July 30, 2007, at which time Graul informed Bailey that he was suspended from work for three days for refusing to haul the trailer. R. D. & O. at 3, 17; Tr. at 27; G. Ex. 5. On August 3, 2007, upon Bailey's return to work after the suspension, he was notified that his employment was terminated for trying to hold up production. R. D. & O. at 17; H. Tr. at 31. Bailey's supervisor testified that he had seen the relevant weight ticket from the trailer that Bailey had refused to pull, and it was not overweight. Tr. at 137, R. D. & O. at 8. However, as Graul admitted, that weight ticket is not in the record. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations. 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

[1] Bailey's co-worker, Brian Valentine, drove the pre-loaded trailer to the plant for processing. Tr. at 22.

the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). 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).

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. To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). Once the employee has established that the protected activity was a "contributing factor" in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Id.*[2]

1. Protected Activity

The employee activities the STAA protects include: making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] 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 hazardous safety or security condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

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[2] Pursuant to the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (Aug. 3, 2007), STAA was recodified at 49 U.S.C.A. § 31105, with the burdens of proof standard amended to incorporate the AIR 21 standards set forth at 49 U.S.C.A. § 42121(b) (Thomson/West 2007). See 49 U.S.C.A. § 31105(b)(1). Nevertheless, because the "contributing factor" standard that Bailey is required to meet is a lesser burden of proof than that which the ALJ employed, and the "clear and convincing evidence" burden of proof standard required of Koch Foods is a higher burden of proof than the Title VII preponderance of evidence standard, see 75 Fed. Reg. 53550, we consider the ALJ's failure to apply the proper standard harmless error as application of the proper standard would not have changed the result the ALJ reached in this case. *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).

The ALJ recognized that Bailey' refusal to drive what he believed to be an overweight tractor-trailer "was based on a concern that he would be violating both state and federal law, and that he could cause an accident which would lead to liability and potential injury." R. D. & O. at 15. The ALJ concluded that these concerns, as expressed to the Respondent, "satisfy § 31105(a)(1)(B)." *Id.* Citing cases that address the complaint provisions under Section 31105(a)(1)(A), the ALJ noted that a complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection and found that Bailey reasonably believed that hauling the overweight trailers would violate both state and federal safety laws. The ALJ also found that Bailey expressed a reasonable apprehension of serious injury to himself or the public. Thus, the ALJ concluded that Bailey's refusal to haul the trailer on July 26, 2007, was protected activity.

The Respondent contends on appeal that the ALJ erred in finding that Bailey engaged in protected activity under Section 31105(a)(1)(B)'s "refusal to drive" provisions. Subsection (B)(i), the Respondent argues, does not afford Bailey whistleblower protection because there would not have been an actual violation of any federal law governing weight limits if Bailey had hauled the trailer as it was not in fact overweight. Subsection (B)(ii) does not afford Bailey protection, the Respondent argues, because Bailey did not, prior to refusing to drive, seek the Respondent's correction of the perceived overweight condition, which the Respondent argues is a condition for qualifying for protection under Section 31105(a)(1)(B)(ii).

As previously noted, 49 U.S.C.A. § 31105(a)(1)(B)(i) protects from retaliation an employee 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, health, or security." The ALJ did not make a definitive finding on whether the trailer Bailey refused to haul had been overweight. Rather, in reaching his conclusion that Bailey's refusal to drive was protected under subsection (B)(i), the ALJ held that Bailey was not required to prove that he would have violated federal weight standards if he had driven the tractor-trailer, citing *Yellow Freight v. Martin*, 954 F.2d 353 (6th Cir. 1992); *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 1995-STA-038 (ARB Jan. 9, 1997); *Lajoie v. Envtl. Mgmt. Sys.*, No. 1990-STA-031 (Sec'y Oct. 27, 1992); and *Nix v. Nehi-R.C. Bottling*, No. 1984-STA-001 (Sec'y July 13, 1984). However, these decisions do not address claims of protected activity arising under subsection (B)(i), but instead address either complaints related to violation of vehicle safety laws for which whistleblower protection was sought pursuant to subsection (a)(1)(A) or refusal to drive for which protection was sought under subsection (a)(1)(B)(ii). On appeal the Respondent cites this misapplication of case authority, and argues that case law interpreting subsection (B)(i) holds that an actual violation must be shown to protect a refusal under this subsection.

The Respondent cites several decisions in support of its argument that subsection (B)(i) limits refusal to drive whistleblower protection to only those instances in which driving would result in an actual violation of federal law.[3] While we agree that these decisions appear to

[3] The Respondent cites the ARB decisions in *Minne v. Star Air, Inc*., ARB No. 05-005, ALJ No. 2004-STA-026 (ARB Oct. 30, 2007), and *Cummings v. USA Truck*, ARB No. 04-043, ALJ No. 2003-STA-047 (ARB Apr. 26, 2005), the Secretary of Labor's earlier decisions in *Ass't Sec'y & Vilanj v. Lee & Eastes Tank Lines*, No. 1995-STA-36 (Sec'y Apr. 11, 1996), and *Robinson v. Duff*

require that the employee's refusal to haul be based on an "actual" violation of a safety regulation, we note that the statute does not include the qualifier "actual." A literal reading of the statute arguably suggests that refusals are protected only where the operation of the vehicle "violates" a regulation. Previously, we have not interpreted this provision so strictly and have only required proof that the conduct, if carried out, "would violate" a safety regulation. *See Yellow Freight System, Inc. v. Martin,* 983 F.2d 1195 (2d Cir. 1993)(*Spinner*); *Brame v. Consolidated Freightways,* No. 1990-STA-020 (Sec'y June 17, 1992) . To adhere strictly to the present tense use of the term "violates" would require a driver to break the law before refusing to drive an illegal vehicle. This would be an absurd result and cannot be what Congress intended. It is well settled that statutes should be applied to avoid an absurd result. *Wileman Bros. & Elliott, Inc. v. Giannini,* 909 F.2d 332, 336 (9th Cir. 1990); *see United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 242 (1989). Here, the Solicitor argues that the refusal statute also protects refusals based on a reasonable belief that the operation of a truck would violate a safety regulation. The Respondent obviously opposes this view and argues that the true facts must demonstrate that an actual violation would have occurred. Therefore, we must review the language of the statute to determine its scope.

Statutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988).

The STAA's whistleblower protection provision "protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *Brock v. Roadway Express,* 481 U.S. 252, 255 (1987). In passing the STAA, Congress sought to combat the "increasing number of deaths, injuries and property damage due to commercial motor vehicle accidents." 128 Cong. Rec. 32510 (1982) (summary of proposed statute). The purpose of Section 405 of the Act was to provide protection to "insure that employees will not be harassed for not being willing to perpetuate safety violations" and thus improve highway safety. 128 Cong. Rec. 32509-32510 (1982) (remarks of Sen. Danforth). As the STAA's sponsor, Senator Percy, noted at the time of the Act's adoption, "with the 'whistle-blower' protection of this legislation, drivers will be given the protection to refuse to violate the law." *See* 128 Cong. Rec. 32698 (1982).

In *Spinner*, the United States Court of Appeals for the Second Circuit affirmed the Secretary's finding that the complainant engaged in protected activity when he refused to drive despite the fact that there would have been no violation had he driven:

Truck Lines, No. 1986-STA-003 (Sec'y Mar. 6, 1987), and the Second Circuit's decision in *Yellow Freight v. Reich*, 38 F.3d 76, 82 (2d Cir. 1997).

> When Spinner was discharged . . . neither the dispatchers nor Spinner had any tangible evidence to support [a] determination [that driving would *not* violate applicable regulations]. To have concluded at the time Spinner was terminated that the error [in the vehicle inspection report] was clerical and that the form OD-199 could safely be altered without infringing the regulations would have been pure speculation. To rule in hindsight that Spinner should have operated the vehicle in apparent violation of the regulations would serve neither good public policy nor the intent of Congress – particularly when the misunderstanding could have been clarified with the minimal cooperation of the dispatchers.

983 F.2d at 1199.

As first enacted, STAA Section 405 provided protection for drivers who operate a vehicle as follows:

> (b) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle *when* such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or *because* of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

49 U.S.C. § 2305(b) (emphasis added). These sections became known as the "when" clause and the "because" clause for the refusal to drive provision. To prevail on a Section 405(b) complaint under the "when" clause, the courts and the Department of Labor (DOL) required a driver to show that the operation would have been a genuine violation of a federal safety regulation at the time he refused to drive – a mere good-faith belief in a violation did not suffice. *See Spinner*, 983 F.2d 1195; *Brame*, No. 1990-STA-020; *Robinson v. Duff Truck Line, Inc.*, No. 1986-STA-003 (Sec.'y Mar. 6, 1987), *aff'd, Duff Truck Line, Inc. v. Brock*, No. 87-3324 (6th Cir. 1988). However, under the "because" clause, the courts and DOL applied a reasonable belief test, with an "objective reasonableness" component, to determine whether the driver refused to operate a vehicle because of a reasonable apprehension of safety. *Shields v. James E. Owen Trucking Co.*, ARB No. 08-021, ALJ No. 2007-STA-022 (ARB Nov. 30, 2009).

In 1994, the STAA was amended to divide the refusal to drive provision into two separate subsections. These subsections were preceded by the language that "a person may not discharge an employee . . . because the employee refuses to operate a vehicle **because** the operation violates a regulation . . . or the employee has a reasonable apprehension of serious injury to the employee of the public because of the vehicle's unsafe condition." 49 U.S.C.A. §31105(a)(B)(emphasis added). Thus, as both subsections of Section 31105(B) were phrased as

"because" clauses, it appears illogical for the continued application of the "when" language to (B)(i) when it has been eliminated from the statute. *See generally Russello v. United States,* 464 U.S. 16, 23 (1983)(where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion). Statutory principles provide that it should be assumed that Congress was aware of the relevant legal context when it passes or amends legislation. *See generally Gomez-Perez v. Potter*, 553 U.S. 474 (2008).

Given the context of the specific language used in the 1994 amendments, as well as the broader context of whistleblower laws, we must look to the Act's legislative history to determine the Congressional intent in amending the language of Section 31105(a)(1)(B)(ii). Although, the legislative history for the STAA amendments provides that no substantive change was intended, we cannot decipher an alternative explanation for the removal of the word "when" from the refusal to drive provision under the Act.[4] Thus, the legislative history alone leaves us with an unclear congressional intent. However, the construction of the other whistleblower statutes reinforce the conclusion that the 1994 amendments presumably were made to eliminate the restrictive interpretation of the "when" clause by eliminating the "when" and combining that clause with the "because" clause in one section. This also accords with the broad interpretation of the "complaint" clause under Section 31105(a)(1)(A), which protects employees who have filed a complaint or begun a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," or who have testified or will testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). The Board has consistently held that under the complaint clause, the complainant must at least be acting on a reasonable belief regarding the existence of a violation. *See See Smith v. Lake City Enters., Inc.,* ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010); *Guay v. Burford's Tree Surgeon's Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008).

A review of protection for whistleblowers under other federal statutes reveals that a complainant is protected even if his concerns of a safety violation are not valid. Section 211 of the Energy Reorganization Act (ERA), as amended, provides, in pertinent part, that "No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.)." 42 U.S.C.A. § 5851(a)(1)(A)(West 2003 & Supp. 2011). The Board has held that under the ERA, the complainant need not prove an actual violation of a nuclear safety law or regulation; a reasonable belief of a violation is sufficient. Similarly, the Toxic Substances Control Act (TSCA) and the Clean Air Act (CAA) have consistently been interpreted to afford whistleblower protection for those employees who raise concerns regarding statutory violations

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[4] Congress's purpose in passing the 1994 legislation was "to restate in comprehensive form, without substantive change, certain general and permanent laws relating to transportation . . . and to make other technical improvement in [Title 49 of the United States] Code." H.R. Rep. No. 180, 103rd Cong., 2d Sess. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818. According to the section-by-section summary, the recodification resulted in the elimination or changing of several words and phrases considered surplus or unclear. H.R. Rep. No. 180, 103d Cong., 2d Sess. 5 (1994), *reprinted in* 1994 U.S.C.C.A.N. 822.

contingent upon meeting the "reasonable belief" standard rather than proving that actual violations have occurred. 15 U.S.C. § 2622 (1988), 42 U.S.C. § 7622 (1988). Section 42121(a) of AIR 21, enacted in April 2000, provides that protected activity has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be objectively reasonable. A complainant need not prove an actual violation, but only establish a reasonable belief that his or her safety concern was valid. *Sitts v. Comair, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-007 (ARB May 31, 2011).

Where a statute is unclear, we are permitted to provide a reasonable interpretation of statutes we are charged with adjudicating. In this case, we conclude that the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined. Under the environmental whistleblower statutes, the "subjective" component of the reasonable belief test is satisfied in the same manner as it was when it was identified as the "good faith" test – by showing that the employee actually believed that the conduct he complained of constituted a violation of relevant law.[5] *See, e.g., Melendez v. Exxon Chems*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000); *Oliver v. Hydro-Vac Servs*, No. 1991-SWD-001, slip op. at 9-13 (Sec'y Nov. 1, 1995). *Compare, Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008) (Subjective reasonableness requires that the employee "actually believed the conduct complained of constituted a violation of pertinent law."). An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 , slip op. at 14 (ARB 2011). For example, in recognizing the right of an employee to refuse to work "when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful," the Secretary of Labor distinguished "reasonable belief" by explaining: "Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with

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[5] "A survey of decisions issued by the Secretary and this Board in which the *Minard* standard has been applied also reveals that, whether or not the term 'good faith' has been used, the whistleblower has been required to have actually held a belief that there were pertinent statutory violations at the time he or she engaged in the activity subject to whistleblower protection." *Melendez*, ARB No. 96-051, slip op. at 20 (citing *Oliver*, No. 1991-SWD-001, slip op. at 9-13). *See also Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993) (focusing on the necessity of protecting employees from retaliation for their "good faith" whistleblower assertions). *Accord Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009) ("[T]he law is not meant to protect those whose complaints are not undertaken in subjective good faith."); *Livingston v. Wyeth*, 520 F.3d 344, 352 (4th Cir. 2008); *Welch*, 536 F.3d at 277 n.4 (subjective reasonableness requires that the employee "actually believed the conduct complained of constituted a violation of pertinent law").

the employee's training and experience." *Pensyl v. Catalytic*, No. 1983-ERA-002 (Sec'y Jan. 13, 1984).

For the same reasons the Second Circuit expressed in *Spinner*, 983 F.2d at 1199, we fail to see where ruling in hindsight that Bailey should have hauled the trailer in apparent violation of applicable regulations would have served this Congressional intent. Koch Foods does not dispute that trailers such as the one that Bailey refused to drive had been running overweight in violation of federal regulation. The weight tickets submitted as evidence show at least three overweight trailers prior to the incident on July 26, 2007, and the ALJ credited Bailey's testimony that he saw an overweight trailer on the scale in July 2007 and was told by co-workers that the trailers were coming in overweight. Although Koch Foods contends that it addressed the problem and thus the trailer on the day at issue was not overweight, it admits that it did not inform the drivers that the problem had been resolved. Given the failure to inform the drivers of this critical information, Bailey reasonably believed that his truck weighed over 88,000 pounds and such fact, if true, would have actually violated the law. Thus, just as in *Spinner*, there existed an objectively reasonable basis for Bailey's belief that hauling the trailer would have resulted in violation of an applicable federal regulation, a misunderstanding that Koch Foods could have easily clarified. Consequently, we affirm the ALJ's finding that Bailey's actions on July 26, 2007, are protected activity pursuant to Section 31105(a)(1)(B)(i).

2. Bailey's protected activity as contributing factor in his termination

To be entitled to relief under the STAA's whistleblower provisions, the employee must also demonstrate that the refusal to drive the unsafe vehicle was a contributing factor in the employer's termination of the employee's employment. However, even if the employee establishes that his or her protected refusal to drive contributed to the adverse action the employer took, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse action even if the employee had not engaged in the protected refusal to drive the unsafe vehicle. Koch Foods contends that it terminated Bailey's employment because he refused a reasonable assignment and because he slowed down production and attempted to coerce another employee into refusing to drive the new trailer. The ALJ rejected the Respondent's contention that this is a dual motive case as there is no credible evidence that Bailey attempted to coerce Valentine. R. D. &O. at 19. Rather, the co-worker hauled the new trailer to the plant and Bailey followed with a different trailer. Moreover, the ALJ found that the reasons for Bailey's termination are all related to the protected activity and thus cannot serve as clear and convincing evidence that Koch Foods would have terminated Bailey's employment regardless of the protected activity. *Id.*

The ALJ found that on the morning of July 27, 2007, Bailey informed his supervisor that he had refused to haul an overweight load the night before and that afternoon his supervisor told him not to come into work. On July 30, 2007, Bailey received a three-day suspension and on August 3, 2007, his employment was terminated. The ALJ found it relevant that Bailey had never been disciplined before this incident and concluded that the close proximity in time establishes a causal connection between the protected activity and the adverse employment action. R. D. & O. at 17. As the suspension notice states that Koch Foods was suspending

Bailey for refusing to a haul a trailer he believed to be overweight, we affirm the ALJ's finding that Koch Foods terminated Bailey's employment because of his protected activity as substantial evidence supports it. G. Ex. 5.

3. Damages

Koch Foods also contends that the ALJ erred in using Bailey's average weekly wage when it discharged him to determine the amount of Bailey's back pay, rather than the amount earned by similar employees after he was terminated. We affirm the ALJ's use of Bailey's wages to determine the amount of his back pay award as it is reasonable and reflects the amount Bailey was able to earn when Koch Foods terminated his employment. *See Gagnier v. Steinmann Transp., Inc.*, No. 1991-STA-007 (Sec'y July 29, 1992) (Secretary rejected employer's argument that the back pay award should be based on the salary of the complainant's "replacement" driver). In addition, we reject the Respondent's contention that Bailey did not properly attempt to mitigate his damages as he did not obtain employment after his suspension on July 27, 2007, and subsequent termination, until he began working as a dispatcher for Tyson Food on December 23, 2007. Bailey testified that he attempted to obtain a driver position with a few other trucking companies, but was unsuccessful. Tr. at 38. He also testified that he did not know if there were any available driving positions, because he had not attempted to secure one. Tr. at 56-57. Bailey began working as a dispatcher for Tyson Food on December 23, 2007, and as a driver in September 2008. As the burden is on the employer to prove that the complainant failed to mitigate damages by the exercise of reasonable diligence in seeking and maintaining other suitable employment, *Moyer v. Yellow Freight Sys., Inc.*, No. 1989-STA-007 (Sec'y Aug. 21, 1995), and Koch Foods did not submit any evidence on this issue, we agree with the ALJ's conclusion that Koch Foods has not shown that Bailey failed to exercise reasonable diligence in mitigating his damages.

Finally, Koch Foods challenges the ALJ's award of $8,000 in compensatory damages. The ALJ based this award on the impact that Bailey's unemployment had on various aspects of his life, including depletion of Bailey's savings to pay bills during this period. Contrary to the Respondent's contention, the substantial evidence of record supports the ALJ's finding that Bailey is entitled to compensatory damages based on this impact. We thus affirm the ALJ's award of $8,000 in compensatory damages as reasonable and supported by the substantial evidence.

CONCLUSION

For the above stated reasons, we **AFFIRM** the ALJ's R. D. & O. and, consistent with his recommended award, **ORDER** that Koch Foods reinstate Bailey to his former position at Koch Foods without loss of benefits or other privileges, should he so choose; be awarded back pay of $944.68 per week for the 21 weeks between July 27, 2007, and December 22, 2007; be awarded

back pay of $339.24 per week for the 36 weeks from December 23, 2007 to August 25, 2008; receive interest on the entire back pay award; and receive compensatory damages of $8,000.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge