In the Matter of:

GEORGE BLACKIE, JR.,

COMPLAINANT,

v.

SMITH TRANSPORT, INC.,

and

BARRY SMITH,

RESPONDENTS.

ARB CASE NO. 11-054

ALJ CASE NO. 2009-STA-043

DATE: November 29, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
George Blackie, Jr., *pro se*, Claysburg, Pennsylvania

For the Respondents:
Pamela G. Cochenour, Esq.; Daniel J. McGravey, Esq.; *Pietragallo Gordon Alfano Bosick & Raspanti*, Pittsburgh, Pennsylvania

BEFORE: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado *concurring*.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (STAA),[1] as amended, and its implementing regulations.[2] Complainant George Blackie, a truck driver, filed a complaint with the Occupational Safety and Health Administration (OSHA) on January 29, 2009, alleging that his employer violated the STAA when it terminated his employment after he complained about his service hours. OSHA dismissed the complaint on May 8, 2009. Blackie objected and requested a hearing before an Administrative Law Judge (ALJ). Following a two-day hearing, the ALJ entered a Decision and Order (D. & O.) on May 5, 2011, finding that Blackie failed to establish either a prima facie case of retaliation, or show that protected activity contributed to his alleged adverse action. Blackie petitioned for review. We affirm the ALJ's order dismissing the complaint, but on different grounds.

BACKGROUND

A. Facts[3]

Blackie began working as a truck driver with Franklin Logistics in February 2006. Franklin Logistics is the leasing company that leases drivers to Smith Transport. When Blackie began his employment, he received copies of the company's Orientation Manual, Driver's Handbook, and the Federal Motor Carrier Safety Regulations, which set out the requirements for reporting hours of service.[4] Title 49 of the Code of Federal Regulations, section 395.3 (2011) sets out 11-hour, 14-hour, and 70-hour rules regulating the maximum number of hours a truck driver can drive within certain specified periods of time. The regulation states:

> **§ 395.3 Maximum driving time for property-carrying vehicles.**
>
> Subject to the exceptions and exemptions in § 395.1:
>
> (a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:
>
> (1) More than 11 cumulative hours following 10 consecutive hours off-duty;

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[1] 49 U.S.C.A. § 31105 (Thomson/West 2012).

[2] 29 C.F.R. § Part 1978 (2012).

[3] The ALJ's factual findings are set out in the decision at pp. 2-5, and a summary of testimony at pp. 6-9.

[4] D. & O. at 2, citing 49 C.F.R. § 395.3.

> (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, * * *
>
> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after * * *
>
> (1) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.[5]

Smith Transport truck drivers report their hours of service through the Qualcomm system, a two-way messaging system that operates like e-mail or text messaging. Blackie's supervisor, Jamie Karlie, used the Qualcomm system to "send messages to the driver and the driver to her, but [it did] not allow her to know a driver's hours of service at any given time."[6] Drivers maintained their hours with a log book. The company displayed a sign that read: "Is Your Logbook Current?" This sign was located over the payroll department door, which is located in the driver's lounge and cafeteria in the company's Roaring Spring facility where Blackie worked. Company policy states that falsifying a driver log book and time records is "grounds for immediate termination."[7]

Smith Transport paid drivers by the mile.[8] Blackie was among the higher-paid drivers in his particular category, but he frequently violated hours-of-service rules and falsified his log book to maximize his income.[9] During 2007 and 2008, Blackie received numerous driver notification letters informing him of his infractions of the federal regulatory 11-hour, 14-hour, and 70-hour rules.[10]

On August 28, 2008, Blackie sent a Qualcomm message to Karlie expressing dissatisfaction with one of his route assignments. He wrote to Karlie: "If your [sic] goin [sic] to

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5 49 C.F.R. § 395.3; see also D. & O. at 3, n.1.

6 D. & O. at 3, citing Hearing Transcript (Tr.) at 222.

7 D. & O. at 3, citing Respondents' Exhibit (RX)-2.

8 D. & O. at 3.

9 *Id.*; see also Tr. at 171, 195, 261.

10 *See* D. & O. at 3, n.2; see also RX-4, 5.

screw me again on the last day of the pay period, give me some decent miles."[11] Karlie found the message inappropriate.[12] Karlie met with Blackie the next day, and discussed with him, among other things, the hours-of-service rules, his driving assignments, and the use of unprofessional and profane language on the Qualcomm messaging system. Karlie warned Blackie that his conduct would "not be tolerated."[13]

A few days later, on September 3, Blackie complained again about his route assignments. Using the Qualcomm system, Blackie wrote to Karlie:

> Are you all having a contest to see who canscrew for the most miles and leave me sit for free the longest in one pay period? Great driver appreciation for woking the holliday weekend! I said I am already hooked and loaded with load no. 1947834. There is a loasy 6 mile difference in the loads. And then srew me for the 290 mile run to right [sic throughout].[14]

A company manager responded, telling Blackie to "refrain from sending profanity over the Qualcomm."[15]

On September 4, 2008, Blackie received an initial assignment from Karlie but after reviewing his available hours he requested a longer assignment. Karlie told him that he did not have enough hours to drive a longer route.[16] Karlie assigned Blackie another shorter assignment; Karlie thought Blackie had enough hours to complete the trips, pick up a return load, and make it back to his assigned destination without violating the hours-of-service rules.[17] Blackie, however, believed he was being set up to violate his hours[18] and that day sent a Qualcomm message to his dispatcher:

> Im delivering this load gabbing an mt and bringing it to the yard. After this weeks running illeagle all weak for chump change! 2 ½ years worth of costantly fighting with the untouchables for miles

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11 D. & O. at 4, citing RX-6.

12 *Id.*, citing RX-6.

13 RX-13.

14 D. & O. at 4, citing RX-6.

15 *Id.*, citing RX-10.

16 *Id.*, citing Tr. at 35, 37.

17 Tr. at 235.

18 D. & O. at 4, citing Tr. at 35, 39-40.

> and a decent check, running illegeal through all, weather drivers are making money or not, its the Barry Smith way, your ging to be a fedaral criminal. This week proves that once again. I thought I was as low as I could get constantly playing catcth up. I got a wake up call todayafter sending in all the hrs for the week and mac 62, well you can imagine how pissed I am rite now. When you think you cant get any lower, Smith Transport dumps more crap on ya. Im shutting my self douwn before you all add me to the list of vehickular homicide. I can take my own lumps in life, but killing somebody else over fighting for a lousy pay check. I don't want to live with that, and I refuse to allow you, Barry Smith or the rest of his untoubles push in to that. Like I said I,m shutting my self down. Ya,ll cant pat your selves on the back you put another driver down! Fire me if you wish, service falure what ever. 2 killed last year , times 25 years thats at least 50 dead and countless others injured, apparently aceptable loses for Barry Smith, I dought if there families would agree [sic throughout].[19]

After sending this message, Blackie dropped off his load in Alexandria and returned to the Roaring Spring facility; he assumed he was fired.[20]

Karlie notified Randy Calcaginio, Senior Director of Fleet Operations for Smith Transport, about Blackie's September 4 Qualcomm message. Calcaginio met with Blackie on September 7, and Blackie told Calcaginio that he frequently violated hours-of-service rules to drive longer routes.[21] Calcaginio later met with Darryl Carter, Vice-President of Human Resources and Risk Management, to discuss the Qualcomm message. Carter terminated Blackie's employment the next day, on September 8.[22]

B. ALJ Decision

The ALJ held that Carter fired Blackie in response to his September 4, 2008, Qualcomm message. The ALJ's analysis centered on whether Blackie engaged in protected activity, and whether any such activity caused his termination.

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19 *Id.* at 5, citing CX 33, RX-8.

20 *Id.* at 5, citing Tr. at 44-45.

21 *See* D. & O. at 5; see also Tr. at 171, 195, 261.

22 *Id.* at 5; see also Tr. at 46-48; Carter Deposition (Dep.). at 15-17.

Blackie argued below that he made several verbal complaints to supervisors about being in violation of the hours of service regulations.[23] The ALJ determined, however, that Blackie failed to prove that contention. The ALJ observed Blackie's statements that "beyond his own 'mental records' . . . he did not keep any handwritten records of his verbal complaints to Smith Transport that he was being forced to run in violation of the hours of service regulations."[24] The ALJ found that Karlie's testimony reflected that Blackie "never raised an hours of service issue with her" and instead she testified that Blackie "expressed concerns about driving as many miles as possible in order to make the most money."[25] The ALJ also observed Calcaginio's testimony that before the September 8 meeting, Blackie "had never complained to him that he was being forced to drive in violation of" federal STAA regulations.[26] The ALJ found Karlie and Calcaginio "equally as credible as" Blackie and concluded that Blackie failed to carry his burden of proving that he made protected, internal complaints to the company.

The ALJ determined that the September 4, 2008, Qualcomm message constituted protected activity under 49 U.S.C.A. § 31105(a)(1)(A), but not a protected refusal to drive under section 31105(a)(1)(B)(i). The ALJ found, contrary to the employer's assertions, that "there is no evidence which suggests that Complainant did not have a sincere and honest belief that he was being dispatched in violation of the hours of service regulations," and thus the Qualcomm message was protected under the Act.[27] The ALJ further determined, however, that the Qualcomm message was not a protected refusal to drive under 49 U.S.C.A. § 31105(a)(1)(B)(i) because there was no evidence showing that an "actual violation of the hours-of-service regulations at 49 C.F.R. § 395.3 would have occurred had he accepted a dispatch to pick up the load in Vail, Pennsylvania, and deliver it to Amityville, New York."[28]

The ALJ further held, based on undisputed evidence, that Blackie's termination was an adverse action under STAA. The ALJ, however, rejected Blackie's allegation that he was blacklisted in violation of the Act, finding that while Blackie applied for other positions after Smith Transport terminated his employment, he failed to prove that Smith Transport "caused prospective employers to deny him employment."[29]

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23 D. & O. at 6.

24 *Id.* at 12-13, citing Tr. at 144.

25 *Id.* at 13, citing Tr. at 221, 227.

26 *Id.* at 9, citing Tr. at 262-63.

27 D. & O. at 13.

28 *Id.* at 14.

29 *Id.* at 15.

Finally, the ALJ determined that Blackie failed to prove that his protected activity contributed to his termination.[30] The ALJ found that Carter, who terminated Blackie, did not view the content of the September 4 Qualcomm message "as being a complaint by Complainant" that he was being "directed" or "requested" to "run in violation of the hours of service regulations."[31] Instead, the ALJ credited Carter's unrebutted testimony that he terminated Blackie for nonretaliatory reasons related to "'risk management issues' and because of the 'disrespectful language' he used."[32] The ALJ found that this reasoning was corroborated by Karlie's testimony that "the root of Complainant's grievance with Respondents was his feeling of being 'screwed out of making more money' because he was not being given the longer runs, as other drivers were getting preferential treatment that allowed them to make more money."[33] The ALJ also credited Calcaginio's testimony that the Qualcomm message "alarmed and concerned him because of its inappropriate and abusive content."[34] The ALJ further credited Calcaginio's testimony that during the September 8 meeting, Blackie "admitted . . . that he runs illegally in violation of the hours of service rules in order to make enough money."[35] Based on this evidence, the ALJ concluded that Blackie failed to show that protected activity was a contributing factor in his discharge.[36]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under STAA.[37] The ARB reviews the ALJ's factual findings for substantial evidence and conclusions of law de novo.[38]

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30 *Id.*

31 *Id.* at 16, citing Carter Dep. at 14-15.

32 *Id.* at 16.

33 *Id.*, quoting Tr. at 228.

34 *Id.* at 16.

35 *Id.* at 16, citing Tr. at 261.

36 *Id.* at 16.

37 Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

38 *Myers v. AMS/Breckenridge/Equity Grp. Leasing 1*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008, slip op. at 3 (ARB Aug. 3, 2012).

DISCUSSION

A. STAA Whistleblower Standard of Proof

To prevail on his STAA whistleblower complaint, Blackie must prove by a preponderance of the evidence that (1) his safety complaints to his employer were protected activity; (2) the company took an adverse action against him, and (3) his protected activity was a contributing factor to the adverse personnel action.[39] If Blackie proves by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel action, his employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event.[40] "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[41]

B. The ALJ's contributing factor determination is supported by substantial evidence

The ALJ found that Blackie's complaint about hours-of-service violations, contained in his September 4 Qualcomm message, was protected activity under the Act.[42] We assume, without deciding, that the ALJ's ruling on protected activity is correct. The Respondents did not expressly challenge that determination on appeal, and we do not address it in this decision. Instead, we resolve this case based on the ALJ's contributing factor ruling.

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[39] 49 U.S.C.A. § 31105. *See also Warren* v. *Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012). The STAA's 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. The provision specifically states: "All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)." 49 U.S.C.A. § 31105(b)(1)). Under the AIR 21 standard, complainants 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* 75 Fed. Reg. 53545, 53550. 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, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii).

[40] *Warren*, ARB No. 10-092, slip op. at 6 (citing 49 U.S.C.A § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

[41] *Id.*

[42] *Id.* at 5-6, 13.

"Contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[43] The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence.[44] Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.[45] While not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation.[46] The ALJ recognized that the timing of Blackie's termination on September 8, 2008 – only four days after his September 4, 2008 Qualcomm message – raised an inference of causation.[47] The ALJ failed to appreciate, however, another aspect of these particular facts tending to show causation in this case.

It is undisputed that the September 4 Qualcomm message was, at a minimum, the catalyst for Blackie's termination. The facts show, and the ALJ found, that the Qualcomm message was given to Carter, Vice President of Human Resources for the company, and that Carter fired Blackie after reading the message.[48] The Qualcomm message contained, among other issues, the hours of service complaint that the ALJ found to be protected. Because the Qualcomm message containing the protected activity was itself so linked to Blackie's termination, it is difficult to conceive of how a fact-finder could distinguish exactly which aspect of the Qualcomm message – the protected part or the unprotected part – caused Blackie's termination. Arguably, Blackie's complaints about hours-of-service were presumptively a contributing factor to his termination because they were encompassed by the Qualcomm message that triggered his termination.

Nevertheless, presumptions may be overcome, and the ALJ adduced sufficient evidence to support his precise ruling on contributing factor. Though we may have viewed the evidence

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43 *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011).

44 *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011).

45 *Id.*

46 *See Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept 26, 2012)("Temporal proximity is an important part of a case based on circumstantial evidence, often the 'most persuasive factor,'" quoting *Beliveau* v. *U.S. Dep't of Labor*, 170 F.3d 83, 87 (1st Cir. 1999)); *see also Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

47 D. & O. at 15.

48 D. & O. at 7 ("Calcaginio . . . shared a copy of the Qualcomm message that Complainant dispatched on September 4, 2008 [with Carter]."), citing Carter Dep. at 12.

on contributing factor differently, we are not at liberty to overturn findings supported, as here, by substantial evidence. The evidence showed that Blackie had frequently been cited for driving in violation of the hours of service rules throughout 2007 and 2008[49] and that recently on August 29, 2008, Blackie's supervisor warned him about using unprofessional language over the Qualcomm.[50] The evidence also showed that after Carter read the Qualcomm message, he terminated Blackie based on a concern that he "posed a risk to the motoring public, as well as his own safety."[51] Based on the language Blackie used in his Qualcomm message,[52] Carter believed that Blackie was "very frustrated and very upset on the road" and that "from a risk standpoint [Carter] felt that he needed to act upon his concerns."[53] The ALJ observed that Carter fired Blackie because of "risk management issues that arose and were evident in the language he used in his Qualcomm message, as well as the fact that he acknowledged he was running illegally in violation of company policy,[54] and for the disrespectful language used concerning Barry Smith, the owner and founder of Smith Transport."[55] Carter's testimony as to the bases for his decision to terminate Blackie – which the ALJ fully credited[56] – establishes that protected activity did not contribute to Carter's termination decision. The ALJ's specific findings on contributing factor in this case are fully supported by substantial evidence in the record.

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49 *Id.* at 3, n.2; *see also* RX-4, 5.

50 *See, e.g.*, *Bechtel*, ARB No. 09-052, slip op. at 15 (ARB determines that "substantial evidence supports [ALJ's] finding that CTI's financial condition and revenue problems concerns were the reasons for discharging Bechtel, not his protected activity.").

51 D. & O. at 7; see also Carter Dep. at 18.

52 *Supra* at 4-5.

53 *Id.*

54 Blackie estimated that he falsified 90% of the logs he submitted by excluding the time he spent on duty waiting for a load, getting loaded, and getting unloaded. D. & O. at 6.

55 D. & O. at 7; *see* Carter Dep. at 18.

56 D. & O. at 16 (crediting Carter's "unrebutted testimony that he terminated Complainant's employment for non-retaliatory reasons").

CONCLUSION

For the foregoing reasons, the ALJ's decision dismissing the complaint is **AFFIRMED.**

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado, *concurring*

I concur with the majority's decision affirming the dismissal of Complainant George Blackie's whistleblower claim, but I would affirm on different grounds. I would affirm based upon the Respondents' argument that Blackie failed to present a sufficient basis for reversing the ALJ. As the Respondents argued, Blackie's petition and supporting brief are difficult to understand and, at best, raise arguments centered on discovery issues, effective representation of counsel, and miscellaneous arguments that do not demonstrate where the ALJ erred in dismissing Blackie's claim.[57]

In 2010, before Blackie appealed to the Board, the amendments to STAA eliminated the automatic review of ALJ decisions, requiring parties to "identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived." 29 C.F.R. § 1978.110(a)(2012). In contrast, and respectfully disagreeing with the majority, I do not think that the Respondents' silence as to the ALJ's finding on protected activity necessarily requires the Board to accept such a finding.[58] In this case, stated simply, Blackie sought review

[57] I appreciate that Blackie appears before the ARB without the benefit of legal counsel and that "[w]e construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003). However, such deference does not include constructing appellate arguments for the pro se litigants. *See, e.g., Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 10 (ARB Feb. 28, 2003) (pro se litigants have the same burden as represented parties to prove their case).

[58] I especially think it would be improper in this case to accept the ALJ's findings on protected activity where he failed to specifically address and explain whether it was objectively reasonable for Blackie to believe that the September 4 Qualcomm message was protected activity. The ALJ only

and failed to sufficiently articulate a sufficient basis for reversal even under a liberal construction of his arguments. Consequently, I would affirm the ALJ's determination. Finding Blackie's appeal deficient obviates the need to address the merits of the ALJ's decision or the majority's analysis of the merits.

LUIS A. CORCHADO
Administrative Appeals Judge

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found subjective reasonableness in ruling that Blackie reasonably believed he was engaging in protected activity. *See* D. & O. at 13. The ALJ did not discuss whether Blackie's September 4 Qualcomm message was objectively reasonable. It is well settled that objective reasonableness is essential to proving protected activity. *See Sec'y of Labor v. Koch Foods, L.L.C.*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 8-10 (ARB Sept. 30, 2011).