In the Matter of:

WALTER ABBS,	**ARB CASE NO. 12-016**
COMPLAINANT,	**ALJ CASE NO. 2007-STA-037**
v.	**DATE: October 17, 2012**
CON-WAY FREIGHT, INC.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Donald F. Foley, Esq. and Marie Castetter, Esq.; *Foley & Abbott,* Indianapolis, Indiana

For the Respondent:
Robin E. Shea, Esq.; *Constangy, Brooks & Smith, LLP;* Winston-Salem, North Carolina; Daniel W. Egeler, Esq.; *Con-Way Freight, Inc*.; Ann Arbor, Michigan

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 provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (Thomson/West 2007), and its implementing regulations, 29 C.F.R. Part 1978

(2011). Complainant Walter Abbs appeals from a decision and order of a Department of Labor Administrative Law Judge (ALJ) dismissing Abbs's complaint for failure to establish a causal link between Abbs's December 8, 2005 discharge and any STAA-protected activity. ALJ Decision and Order Granting Respondent's Motion for Summary Decision (November 4, 2011)(D. & O. II). The issue presented to the Board on appeal is whether the ALJ properly granted summary decision on the issue of causation. For the reasons that follow, the Board affirms the ALJ's decision and order.

BACKGROUND

Abbs alleged that his former employer, Con-Way Freight, Inc., violated the STAA when it terminated his employment for allegedly engaging in activity that the STAA protects. The Occupational Safety and Health Administration (OSHA) investigated Abbs's complaint and dismissed it because it had been adjudicated in federal court.[1] Abbs objected to the dismissal and requested a hearing. Prior to a hearing, a Department of Labor ALJ granted Con-Way's motion to dismiss on collateral estoppel and res judicata grounds. Abbs appealed. The Administrative Review Board (ARB or Board) held that neither res judicata nor collateral estoppel resulting from the federal district court's disposition of Abbs's complaint barred his STAA complaint. Accordingly, the ARB reversed the ALJ's decision to dismiss the complaint, and remanded the case to the ALJ for further proceedings. *Abbs v. Con-Way Freight, Inc.*, ARB No. 08-017, ALJ No. 2007-STA-037 (July 27, 2010).

On remand, the ALJ considered the case pursuant to the pre-2007 amendments to the STAA.[2] The ALJ found that the evidence failed to establish a causal link between Abbs's December 8, 2005 discharge and any protected activity, including the 3-hour safety break or "nap" Abbs took December 5 on the road when he felt ill. The ALJ thus concluded that there was no genuine issue of material fact on the issue of causation. Therefore, the ALJ held that Abbs did not establish a prima facie case of retaliatory discharge under the STAA. D. & O. II at 10-13. The ALJ further found, however, that even if Abbs had established a prima facie case, (1) Con-Way proffered a legitimate non-discriminatory reason for terminating Abbs's employment, namely Abbs's falsification of his logbook on December 5 – a sufficient reason to warrant discharge, and (2) Abbs did not demonstrate a genuine issue of material fact that this sole proffered reason for discharge was a pretext for retaliation. *Id.* at 13-15. Therefore, the ALJ granted Con-

[1] Secretary's Findings dated May 10, 2007.

[2] Congress amended the STAA in August 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1)(Thomson/West Supp. 2012).

Way's motion for summary decision and dismissed Abbs's SOX complaint. Abbs appealed. We affirm the ALJ's dismissal of the complaint based on Abbs's failure to prove causation.

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 at 29 C.F.R. Part 1978. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

The ALJ's order granting summary decision under 29 C.F.R. § 18.40, is reviewed under the same standard governing summary judgment under Federal Rule of Civil Procedure 56. We review an ALJ's grant of summary decision de novo. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 2 (ARB Nov. 30, 1999). Under 29 C.F.R. § 18.40(d) (2011), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Accordingly, the Board views the evidence in the light most favorable to the nonmoving party in determining whether there exists any genuine issue of material fact and whether the ALJ correctly applied the relevant law in ruling on the motion for summary decision. *Lee v. Schneider Nat'l Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 A(ARB Dec. 13, 2002).

In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.[3] The burden of producing evidence "is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 252 (1986); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008). Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

[3] *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). *See also Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027, slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

DISCUSSION

The STAA states 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 regulation, standard, or order." *Id.* Abbs argues that Con-Way discharged him for taking a protected safety break, *e.g.* nap, the morning of December 5 when he felt ill during his return drive to the Fremont terminal. Complainant's Brief at 2. Con-Way contends that it fired Abbs because upon his return to Fremont that morning, Abbs falsified his log book and pay sheet by entering a return time of 5am – the time he was due – rather than the actual time, 7:52am. Respondent's Brief at 9. Con-Way argues that even:

> assum[ing] . . . that Abbs was indeed sick on the early morning of December 5, and that his three-hour nap between Detroit and Fremont was a "safety break," and that Abbs had no intention of cheating or "ripping off" Con-Way[,] . . . Con-Way was properly granted summary decision because Abbs was not terminated for being sick, for taking a "safety break," or even for being three hours late on arrival in Fremont without calling in. Nor was he terminated for any type of "theft." Abbs was terminated only because he knowingly entered false information on his driving log and pay sheet. EX 6, pp. 5-6. Because Abbs knew *at the time* that he was under-reporting his service hours on his driving log and his payroll sheet – whatever his motivation – he had committed a termination offense.

Id. at 11 (emphasis in original).

The ALJ found that there is "no dispute that [Abbs] falsified the log book and that falsification is sufficient to warrant discharge." D. & O. II at 14. Based on the parties' positions and the undisputed facts of this case as determined by the ALJ, the issue before the Board on appeal is whether the ALJ properly granted summary decision on the issue of causation, Abbs having established protected activity and adverse action with no challenge on appeal as to either from Con-Way.

Abbs argues that the burden of proof standard on causation established pursuant to the 2007 STAA amendments applies here, and thus asserts that the ALJ erred in applying the pre-2007 standard. Specifically, Abbs argues that the ALJ erroneously required Abbs to show under the pre-2007 standard that his protected activity was the sole cause of his discharge rather than a contributing factor under the amended standard. We agree that the burden of proof established by the 2007 amendments applies here. Nevertheless, the ALJ's failure to apply the proper standard does not constitute reversible

error because, as we discuss below, applying the appropriate standard results in the same outcome since the evidence fails to establish *any* causal link between Abbs's protected safety break and his discharge.

The ALJ relied on the pre-2007 burden of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws. *See Coates v. Southeast Milk, Inc.*, ARB 05-050, ALJ No. 2004-STA-060, slip op. at 6 (ARB July 31, 2007); *see also* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982, 75 Fed. Reg. 53544, 53545 (Aug. 31, 2010) (setting out pre-2007 burden of proof standard for STAA complaints). However, Congress amended the STAA's burden of proof standard effective August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Act). The 9/11 Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to require that STAA whistleblower complaints will be governed by the legal burdens of proof set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b)(Thomson/West 2007)(AIR 21), which contains whistleblower protections for employees in the aviation industry. 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).[4]

As previously noted, where the appeal is from an ALJ's grant of summary decision, the Board's review is de novo. The same standards governing the ALJ's consideration of a motion for summary decision governs our review, including review of the law de novo. Accordingly, notwithstanding the ALJ's application of the pre-2007 burdens of proof, we consider whether Abbs failed to prove that his protected activity was a contributing factor to his discharge consistent with the 2007 STAA amendments. *See* 29 C.F.R. § 1979.109(a).

Abbs asserts that the ALJ failed to consider evidence of other, earlier protected activity that resulted in hostility and pressure not to take safety breaks. The ALJ considered all alleged protected activity and adverse action, but determined that there was no evidence of a link, inferential or direct, "between any of his protected activity and his termination," the only tangible employment action supported by the record. D. & O. II at

[4] If the ALJ concludes that the employer was motivated by both prohibited and legitimate reasons (has mixed or dual motives), the employer may escape liability only by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ Nos. 2008-STA-043, -44; slip op. at 5 (ARB Dec. 18, 2009). This case, however, is not a mixed or dual motive case.

13; *see also id.*, at 8-13. The record fully supports the ALJ in reaching this conclusion. Deposition of Walter Abbs at 98, 191 (Feb. 11, 2005), Tab 2 to Appendix, Respondent's Motion for Summary Decision (May 27, 2011); Deposition of Walter Abbs at 228, 251, 341, 359 (May 19, 2005) Tab 3 to Appendix, Respondent's Motion for Summary Decision (May 27, 2011); Deposition of Richard Pogliano at 38-46 Tab 4 to Appendix, Respondent's Motion for Summary Decision (May 27, 2011); Declaration of Paul Frayer Tab 1 to Appendix, Respondent's Motion for Summary Decision (May 27, 2011).

Abbs also argues that the ALJ erroneously discounted the "temporal proximity" between his protected safety break and his discharge three days later. The ALJ found no inference of a causal link due to temporal proximity because, (1) there was an intervening event sufficient to independently cause Con-Way to discharge him, namely Abbs's admitted falsification of his log book and payroll record, and (2) it is undisputed that Abbs's supervisor told him he was free to take safety breaks when he needed them. D. & O. II at 11-13. The ALJ's determination that Abbs's falsification of his log book and payroll records broke any inference of causation based on temporal proximity is supported by the record and consistent with applicable law. See *supra* at 4-6; 13; see generally *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006); *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005); see also Declaration of Paul Frayer Tab 1 at 4 and Tab 1, Exhibit A to Appendix, Respondent's Motion for Summary Decision (May 27, 2011)(Frayer states and offers chart showing that Abbs's employer discharged 41 employees between 2000 and May 2011 for various types of falsification, with 14 of those 41 employees, including Abbs, discharged for falsifying driving logs.).[5]

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order Granting Respondent's

[5] The facts showing that Con-Way terminated Abbs's employment because he falsified his log book and payroll record is indeed compelling, and fully supports the ALJ's determination that there was no causal link between any protected activity and the adverse action his employer took. While the ALJ reached this determination under the pre-2007 STAA standard, the same determination can indeed be reached under the current burden of proof standard. Certainly, the undisputed evidence of Abbs's falsification of the log book and payroll record is "clear and convincing evidence that [Con-Way] would have taken the same adverse action in the absence of the protected conduct." 49 U.S.C.A. 42121(b)(2)(B)(ii); 75 Fed. Reg. 53545, 53550. The ALJ's decision on remand to employ the pre-2007 standard is thus harmless error. *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).

Motion for Summary Decision is **AFFIRMED**, and Abbs's STAA complaint is **DISMISSED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge