



In the Matter of:

SYDNEY CORYELL,

ARB CASE NO. 12-033

COMPLAINANT,

ALJ CASE NO. 2010-STA-042

v.

DATE: April 25, 2013

ARKANSAS ENERGY SERVICES, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:¹

For the Complainant:

Sydney Coryell, *pro se*, Overland Park, Kansas

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. 31105 (Thomson Reuters 2012), and its implementing

¹ Respondent Arkansas Energy Services (AES) did not enter an appearance before the Administrative Review Board. Pending before the Board is a motion by the Respondent's counsel, Martin W. Bowen, to withdraw based on his representation that he can no longer communicate with AES. Mr. Bowen advised AES's last known representative of the scheduling order and of his intention to withdraw. The motion to withdraw is granted.

regulations, 29 C.F.R. Part 1978 (2012). Complainant Sydney Coryell filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Arkansas Energy Services LLC (AES), violated STAA when it terminated his employment. OSHA found no merit to Coryell's complaint, and Coryell requested a hearing before a Department of Labor Administrative Law Judge (ALJ). On December 28, 2011, after a hearing, an ALJ entered a decision determining that AES's employment action did not violate STAA. Coryell petitioned for review. We affirm.

BACKGROUND

I. Facts

AES is one of several trucking companies that provide service to the gas drilling industry on the Fayetteville shale plate in Arkansas, and a majority of its business comes from Southwestern Energy. *Coryell v. Arkansas Energy Servs., LLC*, ALJ No. 2010-STA-042, slip op. at 4-5 (Dec. 28, 2011)(D. & O.). Coryell initially began working for AES on February 20, 2009, but AES terminated his employment the next month, on March 11, 2009, after AES received a report that he had been speeding at the Southwestern Energy work site. *Id.* at 5-6. Following his termination, Coryell filed a complaint against AES with the United States Department of Transportation (DOT) in March 2009. D. & O. at 6 (citing Cl. Ex. 4). Before DOT initiated an investigation, AES rehired Coryell on June 19, 2009, and he worked until AES again terminated his employment on September 17, 2009. D. & O. at 7. During this second period, Coryell's driving skills were the subject of several complaints filed with the company, including from other drivers, truck pushers, dispatch, and a designated trainer, James Hargis. *Id.* at 7-8. Hargis prepared a narrative report of a training ride with Coryell in which he expressed concern that Coryell was a "hazard on the road." *Id.* at 8 (citing R. Ex. 2D).

During Coryell's second period of employment, AES adopted a policy regarding the use of filtering equipment when its drivers load water onto trucks. The policy required the use of floats and screens when using hoses in pits, shallow ground water, and flow back water to avoid smaller solid particles from entering the hoses. D. & O. at 10 (quoting Hearing Transcript (Tr.)) at 284. This policy was in response to requirements Southwest Energy imposed at the drilling sites, and allowed for "zero tolerance" of non-compliance, so that "if a driver fails to use the required equipment, they are terminated from employment with AES." Tr. at 259, 303, 393; D. & O. at 11 ("there was no tolerance because at the time period [Southwestern Energy] had warned us that we would lose work' if AES's drivers did not use the screens, socks and floats."). On September 16, 2009, Coryell received an "A.E.S. Pit Work Order" instructing him to haul shallow ground water from a small pit on a drilling lease to the AES yard. D. & O. at 12. Coryell proceeded to fulfill the work order without the required filtering equipment and float. A co-employee observed this and reported it to management. When Coryell returned to the AES yard with his second load of water, he was called to the office and informed that AES was immediately terminating his employment. *Id.* at 13.

On September 17, 2009, Allan Gregorcyk, AES's general manager, completed a "Personnel Action Form" in which he indicated that AES had terminated Coryell for the following reasons: 1) "extracted cuttings without a screen," and 2) "spilled cuttings." *Id.* at 21 (citing R. Ex. 2D-3). Gregorcyk testified that he considered the training report as well as the complaints from other truck drivers and truck pushers in making his decision to terminate Coryell's employment. Tr. at 313.

2. ALJ Decision

On December 28, 2011, the ALJ entered a decision dismissing the complaint. The ALJ determined that Coryell had established that the complaint against AES to the DOT was protected activity under the STAA, and that Coryell suffered an adverse employment action. D. & O. at 16. The ALJ determined, however that Coryell failed to show by a preponderance of evidence that the protected activity was a contributing factor to his termination.

The ALJ determined that Coryell "failed to present any evidence that any 'decision-maker' at AES was aware that he had filed the DOT complaint." *Id.* at 19. The ALJ stated that "both Mr. Gregorcyk and Mr. [John] Gerke have repeatedly denied that they knew of Mr. Coryell's protected conduct when they terminated his employment on September 17, 2009." *Id.* The ALJ found that while two co-workers were aware of Coryell's DOT complaint, "there is no evidence that either co-worker informed AES's 'decision-makers.'" *Id.*

The ALJ further determined that the company presented "clear and convincing evidence" that it would have fired Coryell even if he had not engaged in STAA-protected activity. The ALJ cited extensive evidence presented by AES demonstrating that it fired Coryell for the sole reason that he failed to use the socks, screens, and floats at the Stobaugh pit on September 16, 2009. The ALJ observed that the company had a zero tolerance policy for employees who failed to use this equipment to "preserve its business relationship with Southwestern Energy." *Id.* at 22.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (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. 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. § 1978.110(a). The ARB reviews the ALJ's factual findings for substantial evidence,² and conclusions of law de novo. 29 C.F.R. § 1978.110(b); *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 7 (ARB Nov. 29, 2012).

² The ARB is bound by an ALJ's factual findings that are supported by substantial evidence of record. "Substantial evidence" is "more than a mere scintilla." *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

DISCUSSION

To prevail on his STAA whistleblower complaint, Coryell 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. *Blackie*, ARB No. 11-054, slip op. at 8. If the employee does not prove one of these elements, the entire complaint fails. *Id.* AES can avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. *Id.*

On review of the decision below, we find that the ALJ’s determination that Coryell failed to prove causation is supported by substantial evidence in the record. Witness testimony and documentary evidence fully supports the ALJ’s determination that protected activity did not contribute to the company’s decision to terminate Coryell’s employment on September 17, 2009. See D. & O. at 16-20. The ALJ credited the testimony of company managers that they did not know that Coryell had filed the DOT complaint when they fired him on September 17 (Tr. at 244, 255, 281), and, as Coryell admitted, there was no other evidence linking his termination to the protected activity (Tr. at 157-158).

Moreover, substantial evidence supports the ALJ’s determination that AES established by clear and convincing evidence that it would have fired Coryell even absent the protected activity, due to Coryell’s failure to use the mandated equipment at the Stobaugh pit. D. & O. at 20-22. “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012). The ALJ reviewed the evidence of record and credited the testimony of management representatives and drivers that the company’s policy establishing “zero tolerance” for failure to use the mandated equipment was communicated to all employees. D. & O. at 21 (quoting Hargis’s testimony that AES “‘drilled it into us’ at meetings and on company bulletin boards that the filtration requirement was required.”). The ALJ’s factual findings, when supported by substantial evidence in the record as is the case here, and credibility determinations, are afforded deference. See, e.g., *Knox v. National Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 5 (ARB Apr. 30, 2012) (“Because substantial evidence fully supports the ALJ’s factual findings and credibility determinations set out in the D. & O. . . . we afford deference to the ALJ.”). Finally, the ALJ’s legal conclusions are in accordance with law.

CONCLUSION

For the foregoing reasons, the ALJ's decision is **AFFIRMED**, and Coryell's complaint is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge