



In the Matter of:

BYRON WARREN,

ARB CASE NO. 13-004

COMPLAINANT,

ALJ CASE NO. 2009-STA-030

v.

DATE: May 23, 2013

CUSTOM ORGANICS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Raymond Jackson, Esq.; *Speakman & Jackson*, Auburn, Alabama

For the Respondent:

Scott E. Morris, Esq.; *Holt, Ney, Zatzoff & Wasserman, LLP*, Atlanta, Georgia

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, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) (STAA), and its implementing regulations at 29 C.F.R. Part 1978 (2012). Complainant Byron Warren, a trucker, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent Custom Organics violated the STAA

when it terminated his employment. OSHA dismissed the complaint. Warren requested a hearing before an Administrative Law Judge (ALJ). After a hearing, the ALJ issued a decision on April 27, 2010, recommending that the complaint be dismissed. Warren petitioned the ARB for review. On February 29, 2012, we remanded for further proceedings.

Following further proceedings on remand, the ALJ entered a Decision and Order on September 26, 2012, dismissing the complaint. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under STAA. 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. The ARB reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1978.110(b); *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 prohibits an employer from discharging or discriminating against an employee 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. *Id.* To prove a STAA violation, Warren must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action. *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If Warren proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. *Id.* at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

The ALJ determined on remand that Warren engaged in protected activity stemming from his reporting of unsafe vehicle conditions through the checklist process instituted by the company. The ALJ held that the “company was on constructive notice of [Warren's] written safety complaints because [Warren] followed the company's procedures for making written report of issues.” *Warren v. Custom Organics*, ALJ No. 2009-STA-030, slip op. at 4 (Sept. 26, 2012)(D. & O. on Rem.). The ALJ also determined that Warren's reporting of overweight loads was protected. *Id.* at 5 (“there is no dispute that in at least two instances the complainant did report to Mr. Cowan that the trailers he was scheduled to pull were overweight.”). The ALJ determined, however, that

Warren failed to prove that his protected activity contributed to the company's decision to terminate him. *Id.* at 5-7. Specifically, the ALJ found that the company's reasons for terminating Warren were because he:

[had] an argument with a supervisor on July 3, [] left a container of product exposed to the rain on July 12, and on July 14 [] took a truck home and was unreachable the next morning before the first scheduled pickup.

Id. at 6. The ALJ found the company's witnesses' "version of each of those events to be more credible than [Warren]'s." *Id.*; see also *id.* at 8 (citing Hearing Transcript at 115, 121, that "Mr. Cowan also testified that the complainant had become more unreliable and pointed to a note he had put in his file on July 9, 2008, stating the complainant was increasingly unavailable for work and consistently late."). The ALJ also determined that Cowan's testimony about Warren leaving product unlocked in the rain was not controverted. *D. & O. on Rem.* at 7 ("As to the Employer's contention that the Complainant left product out in the rain, Mr. Cowan's testimony that he did so in July is uncontroverted.").

Based on the evidentiary record as a whole, and on review of the briefs on petition for review, we conclude that the ALJ's findings of fact, upon which the ALJ determined that Warren proved protected activity, but failed to show that the activity contributed to his termination, are supported by substantial evidence of record. While there is conflicting testimony as to the characterization of the incidents, the ALJ found the company's witnesses more credible than Warren. We "generally defer to ALJ factual findings that are based on a witness's credibility as demonstrated by the witness's demeanor or conduct at the hearing except 'where the recommended decision is marked by error so fundamental that its fact findings are inherently unreliable.'" *Hall v. U.S. Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 27 (ARB Dec. 30, 2004), *aff'd sub nom. Hall v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 476 F.3d 847 (10th Cir. 2007). The ALJ's credibility rulings here are entitled to deference, as there are no fundamental errors in this case that would warrant disturbing the ALJ's determinations as to credibility of the witnesses who testified at the hearing. Any conflicts in witness testimony were properly resolved by the ALJ. See *Svendson v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 2002-AIR-016, slip op. at 7 (ARB Aug. 26, 2004). Moreover, the ALJ committed no reversible legal error that would warrant further review.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order on Remand is **AFFIRMED.**

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge