In the Matter of:

NATHAN W. CLARK,

COMPLAINANT,

v.

HAMILTON HAULING, LLC,

RESPONDENT.

ARB CASE NO. 13-023

ALJ CASE NO. 2011-STA-007

DATE: May 29, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Glen C. Shults, Esq.; ***Law Offices of Glen C. Shults,*** **Asheville, North Carolina**

For the Respondents:
Jonathan W. Yarbrough, Esq.; ***Constangy, Brooks & Smith, LLP*****; Asheville, North Carolina**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; and Lisa Wilson Edwards,** ***Administrative Appeals Judge*****. Judge Brown dissenting.**

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended,[1] and its implementing regulations.[2] Nathan Clark, a truck driver, filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 15, 2010, alleging that his employer, Hamilton Hauling, LLC (Hamilton Hauling or Company), terminated his employment in violation of the STAA. OSHA dismissed the complaint. On November 13, 2012, after a hearing, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) determining that Clark proved by a preponderance of the evidence that he engaged in protected activity under the STAA, but

[1] 42 U.S.C.A. § 31105 (Thomson/West Supp. 2013).

[2] 29 C.F.R. Part 1978 (2013).

failed to prove that he suffered an adverse action. Clark petitioned the Administrative Review Board (ARB) for review. We affirm.

BACKGROUND

A. Facts

Clark worked as a truck driver for Hamilton Hauling from April 22, 2009, to September 28, 2009. D. & O. at 8.[3] On September 25, 2009, a Friday, Clark's truck "HH2" had a broken step, a broken gear shift, and a cracked windshield. *Id.* at 8, 13; Complainant's Exhibit (CX) 20. That same day, Clark reported the problems to his boss, John Hamilton (Hamilton), who told him to take the truck to Mike's shop to be repaired over the weekend. *Id.* at 8, 11.

When Clark arrived for the truck on Monday morning, September 28, 2009, the cracked windshield, and possibly other repairs, had not been completed. *Id.* at 13; CX 7. Clark notified Hamilton that the truck was not fully repaired. *Id.* at 8. Hamilton told Clark to drive the truck. *Id.* Clark drove the truck, which had impaired steering, to a quarry and loaded it with heavy materials. *Id.* Clark notified Hamilton that he was having difficulty driving the truck, and that he was taking the truck to a state inspection station. *Id*. Clark dumped the load and drove to the inspection station. *Id.* at 8, 13.

Trooper Barnes, a state inspector, arrived at the station to inspect the truck. *Id.* at 8. Hamilton arrived during the inspection, and Clark and Hamilton exchanged hostile words. *Id.* The Trooper told Clark to leave, and Clark left with a friend who was there to pick him up. *Id.* Trooper Barnes proceeded with the inspection in Hamilton's presence. *Id.* at 9.

After the inspection, Trooper Barnes cited the truck and found the following violations: a broken arm on the tarpaulin, cracked windshield, inoperative speedometer, failure to have company name on the truck, inoperative brake light, inoperative turn signal, and a missing lug nut on one wheel. *Id.* The Trooper also observed loose nuts on some of the rails and crossmembers, holes in the bucket of the truck, worn bushings on the Pitman arm, and brake hose tubing chafing at the reservoir tank. *Id.* at 10. The violations for an inoperative turn signal and a hole in the truck bed caused the truck to be out of service and required repairs before the truck could leave the site. *Id.* at 8, 10. The Trooper assessed the Company a $150.00 fine. *Id.* at 10. The Trooper did not find any problems with the brakes, the steering mechanism, or with the spring shackle. *Id.*

Later that day, Hamilton called Clark and left him a voicemail message. *Id.* at 9; see also CX 24; John Hamilton Deposition at 176-77. Clark never responded to

[3] The ALJ made limited factual findings in his decision. D. & O. at 13-14. Thus the facts set out here are also taken from the portion of the ALJ's decision designated "Evidence Presented." *Id.* at 8-13.

Hamilton's call and never returned to work for the Company. *Id.* at 9. After repairs were made, the truck was back in service the next day, September 29, 2009. *Id.* at 12-13. Another Company employee, Johnny Mullins, drove the truck the next day and had no problems. *Id.*

B. Proceedings below

After a two-day evidentiary hearing, the ALJ issued a Decision and Order on November 13, 2012. The ALJ determined that Clark "engaged in protected activity as it was reasonable for him to suspect that an unsafe condition could produce real danger of accident." D. & O. at 14. The ALJ found that Clark "sought correction of the suspected condition, informed Hamilton, and did not receive an adequate response from the employer." *Id.*

The ALJ observed, however, that there "is a dispute as to whether or not Hamilton told Clark that he was fired at the DMV." *Id.* The ALJ found that the "[voice] message left by Hamilton on the afternoon of September 28, 2009 . . . invited Clark to return to work without any indication of an adverse action such as dismissal." *Id.* The ALJ "heard a tape recording of that call and conclude[d] that Clark was requested to return to work or at least to call Hamilton." *Id.* The ALJ rejected Clark's contention that he was "constructively discharged," holding that "[a]t the time of the afternoon telephone message, a reasonable person would draw the conclusion that a safe truck would be provided and that that the driver would be welcomed back to work." *Id.* The ALJ concluded: "Clark was not terminated, actively or constructively. Clark had the option to return to work and a reasonable person would have explored that option." *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA, and implementing regulations. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see also 29 C.F.R. Part 1978. The ARB reviews the ALJ's factual findings for substantial evidence, and reviews 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

A. Statutory And Regulatory Framework

The STAA prohibits an employer from discharging, disciplining, or discriminating 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. 42 U.S.C.A. § 31105(a)(1). To prevail under STAA, a complainant

must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the protected activity was a contributing factor in the adverse action. *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041; slip op. at 9 (ARB Sept. 15, 2011). If the complainant makes this showing, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. *Id.*

B. Substantial Evidence Supports The ALJ's Determination That Clark Failed To Show He Suffered An Adverse Action

Clark argues that the ALJ erred in failing to find that Hamilton's actions caused Clark to be terminated. Compl. Br. 15, 17-21. For example, Clark argues that the facts show that Hamilton told Clark that he was fired, that Clark was constructively discharged because Hamilton told him to drive or be fired, that Hamilton physically threatened Clark such that a reasonable person would have felt compelled to resign, and that Mullins was not a credible witness for several reasons.[4] This argument lacks merit. The ALJ never made the finding that Hamilton told Clark that he was fired or that he had to drive or be fired. The ALJ noted the dispute between Clark and Hamilton and the events that occurred on Monday, September 28, 2009, and even though Clark testified that Hamilton made certain statements to Clark, Hamilton denied making those statements. D. & O. at 8, 12, 13, 14.

Moreover, based on the evidentiary record as a whole, the ALJ's determination that "Clark was not terminated, actively or constructively" is supported by substantial evidence of record. D. & O. at 14. The ALJ knew of the conflicting testimony of the witnesses at the hearing. D. & O. at 6-7. But in conducting our review, we must uphold an ALJ's findings of fact to the extent they are supported by substantial evidence, even if there is also substantial evidence for the other party, and even if we justifiably disagree with the finding. *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 8 (ARB June 24, 2011). Substantial evidence is evidence that a reasonable person might accept to support a conclusion. *Id.* "[T]he determination of whether substantial evidence supports [an] ALJ's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it

[4] Clark argues that the ALJ erred in applying an incorrect legal standard regarding burden of proof in STAA cases. Compl. Br. 13-14. While Clark is correct that the ALJ erred in stating that Clark was obligated to prove a prima facie case, the ALJ's reference to this standard was harmless. A STAA complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the employer's decision to take adverse action. *Salata*, ARB Nos. 08-101, 09-104; slip op. at 9. Since Clark failed to prove that he suffered an adverse action as part of a prima facie case, a *lower* standard, he also could not prove adverse action by a preponderance of the evidence. *Wolslagel v. City of Kingman, AZ*, ARB No. 11-079, ALJ No. 2009-SDW-007, slip op. at 3 n.11 (ARB Apr. 10, 2013).

really constitutes mere conclusion." *Id.* (internal quotations and citations omitted). "A determination whether evidence is substantial on the record considered as a whole must 'take into account whatever in the record fairly detracts from its weight.'" *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). "'A single piece of evidence will not satisfy the substantiality test if the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence.'" *Id*. (quoting *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986)).

In this case, the ALJ reviewed the evidence at the hearing and determined that after the earlier dispute at the inspection station, Hamilton later called Clark and left a message requesting that Clark "return to work or at least call Hamilton." D. & O. at 14. Substantial evidence supports this determination. Indeed, Hamilton refuted Clark's allegation that he was fired at the weigh station. See D. & O. at 12; see also Hearing Transcript (Tr.) at 459. Moreover, the record reflects Hamilton's voice mail recording asking Clark to return to work after the earlier dispute:

> Hey, it's about 2:30 on Monday. I still got this job for you. I got your truck right there, man. I just don't want your little boy to suffer, so just call me, man, just work this out, get you back to work. See you.

Tr. at 166; see also D. & O. at 9. While we may have decided the case differently, there are no fundamental errors in this case that would warrant disturbing the ALJ's determination that Hamilton did not terminate Clark, either directly or constructively. The ALJ properly resolved conflicts in witness testimony. *See Svendsen v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 2002-AIR-016, slip op. at 7 (ARB Aug. 26, 2004). Further, the ALJ committed no reversible legal error that warrants further review.

Clark further argues that substantial evidence does not support the ALJ's finding that Hamilton's message implied that a safe truck would be provided. Compl. Br. 19-21. Again, this argument asks us to reweigh the evidence, which we are precluded from doing. See *supra* at 4, (citing *Bobreski*, ARB No. 09-057, slip op. at 8). Substantial evidence supports the ALJ's finding that "a safe truck would be provided and that the driver would be welcomed back to work." D. & O. at 14. The evidence shows that the truck was fixed the next day, driven by another driver with no safety complaint, and continued to be driven for a least a year after the September 2010 incident.[5] Clark's remaining arguments do not warrant review since he failed to prove that he suffered an adverse action.[6]

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[5] Tr. at 436-441, 451, 481, 534, 536, 538-539; Respondent's Exhibit-20AA.

[6] The ALJ did not consider the contributing factor and mitigation issues that Clark raises, in the first instance, and for this reason as well, we do not consider them.

CONCLUSION

The ALJ's Decision and Order is **AFFIRMED** and the complaint is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, *dissenting*:

The ARB has held that "[w]hen no clear statements have been made by management establishing an employee's status, '[t]he test of whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer.'" *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 1995-STA-038, slip op. at 4 (ARB Jan. 9, 1997) (quoting *Pennypower Shopping News v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original)); *accord NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990); *NLRB v. Downslope Indus., Inc.*, 676 F.2d 1114, 1118 (6th Cir. 1982); *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1224 (5th Cir. 1980) (per curiam); *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964). As the Tenth Circuit explained in *Pennypower Shopping News*, where an employer's conduct creates a climate of ambiguity and confusion, "[t]he fact that there is no formal discharge is immaterial if the words or conduct of an employer would logically lead an employee to believe his tenure has been terminated." 726 F.2d at 630 (citations omitted). Moreover, where the employer creates the ambiguity that reasonably causes the employee to believe that he was discharged, or at least to believe his employment status was questionable, "the burden of the ambiguity must fall on the company." *Id.*

The ALJ in this case made no formal findings of fact, thus complicating the Board's ability to conduct a substantial evidence review of the ALJ's decision.[7] Nevertheless, it is possible to derive the following from the ALJ's decision:

On Monday morning, September 28th, Clark called Hamilton, the owner of Hamilton Hauling LLC, to complain that the truck he was at the time driving was unsafe.

[7] The analytical portion of the ALJ's Decision and Order (pp. 13-14), which discusses certain events as if they are based on findings of fact, is preceded by a summarization of the Complainant's and Respondent's respective contentions (D. & O. at pp. 3-7), and a segment captioned "Evidence Presented" (D. & O. at 8-13), which might possibly constitute the ALJ's findings of fact but for the designation the ALJ gives this segment of the decision.

Hamilton instructed Clark to drive the truck or he would be fired. D. & O. at 8. In response, Clark informed Hamilton that he was going to take the truck to a state inspection station, whereupon Hamilton told Clark that he was fired. *Id*. Clark proceeded to take the truck to the inspection station, where he informed the state trooper that had been called to inspect the truck that he was being fired for not driving the vehicle. *Id*. at 9.[8] Upon Hamilton's subsequent arrival at the inspection station, he found Clark in the truck and demanded that he get out. *Id*. at 13. A heated exchange of hostile words between the two men ensued inside the truck cab, whereupon the state trooper intervened and ordered Clark to leave that station, which he did. *Id*. at 8. That afternoon, Hamilton left the following voice message on Clark's cell phone:

> Hi man. It's about 2:30 here on Monday. Still got this job for you. *I know there ain't no jobs out there man.* I just don't want to see your little boy have to suffer. *Just call me, man, and just work this out and get back to work.* See you.

Complainant's Exhibit (CX) 19 (emphasis added). *See also* CX 24, Hamilton Deposition at 176-177.[9]

Clark did not return Hamilton's phone message, and did not return to work. When asked at the hearing before the ALJ why, Clark referred to Hamilton's demeanor in the afternoon call, which he considered to be hostile. D. & O. at 14. Clark did not consider Hamilton to be sincere, and believed that things would not have worked out had he returned. *Id*. at 8-9.

The majority dismisses the foregoing, contending that the ALJ "never made the finding that Hamilton told Clark that he was fired or that he had to drive or be fired," that Hamilton denied making such statements, and that "Hamilton refuted Clark's allegation that he was fired at the weigh station." *See supra* at 4, 5. What the ALJ's decision states, however, is that Hamilton denied that he told Clark *at the DMV weigh station* that he was fired. D. & O. at 12, 13. While the ALJ states that, "Clark alleges that Hamilton told him that he was fired while at the DMV, but Hamilton denies this allegation," *id*. at 13, the fact of the matter is that Clark never claimed that Hamilton told him he was fired when they were at the weigh station. Clark's testimony was, instead, that Hamilton

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[8] The ALJ's account of what Clark told the state trooper is based on the state trooper's testimony (Tr. at 250, 254-256, 303), which was corroborated by the trooper's September 28th contemporaneous notes of his conversation with Clark (CX-2-HH, CX-2-II).

[9] This recorded voice message, found on CX 19, is different in certain significant respects from the majority's recitation of Hamilton's message as well as that of the ALJ (see D. & O. at 9); one primary difference being that in the recorded voice message Hamilton does *not* say, "I got your truck right there," instead stating "I know there ain't no jobs out there man."

informed him over the phone earlier that morning that he was fired. D. & O. at 5, 8. *See* Tr. at 93-96, 590.

Notwithstanding the fact that Clark claimed that Hamilton fired him over the phone Monday morning, and that he never claimed that Hamilton fired him at the DMV weigh station, the ALJ nevertheless found that there existed "a dispute as to whether or not Hamilton told Clark that he was fired at the DMV." D. & O. at 14. The majority misses this point, and the significance it underscores. Whether there existed a dispute as to what was said at the weigh station regarding Clark's firing, the fact of the matter is that what Hamilton told Clark – regardless of whether it was at the weigh station or earlier that morning over the phone – gave rise to a degree of ambiguity that the ALJ failed to appreciate and address accordingly. This ambiguity was only heightened by the voice message that Hamilton left for Clark later that afternoon, which did nothing to clarify Clark's employment status.

Clark clearly understood that Hamilton had fired him over the phone the morning of September 28th. Evidencing Clark's understanding that Hamilton had fired him that morning is his explanation of why he took the truck to the particular inspection station that he did (rather than to one closer to his location at the time of his phone conversation with Hamilton). Clark testified that, "I knew I was going to need a ride because he fired me, and so the only ride I could get was a buddy of mine and he lives about a mile or two from the weigh station there, so I called him." Tr. at 95-96. The state trooper's contemporaneous notes of what Clark told him upon his arrival at the inspection station, i.e., that he had been fired (D. & O. at 9), provides credible evidence corroborating Clark's understanding that Hamilton had fired him. Indeed, Hamilton's voice message that he subsequently left for Clark in which he stated, "[I] still got this job for you," that "I know there ain't no jobs out there man," and that "I just don't want to see your little boy have to suffer," suggests that even Hamilton understood that Clark's employment had been earlier terminated.

Moreover, it cannot clearly be deduced from Hamilton's concluding entreaty that a safe truck would be provided if Clark returned to work, or that Hamilton was unconditionally offering to reinstate Clark to employment. As previously noted, Hamilton's voice message did not state, "I got your truck right there."[10] Regarding his

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[10] In fact, from the ALJ's recording in the D. & O. of Hamilton's testimony, it would seem the opposite conclusion could be reached:

> Question: Your cell phone message to Mr. Clark on the afternoon of September 28th.
> Hamilton: Right.
> Question: In that cell phone message, as I recall there was no specific statement by you that truck HH2 had been repaired, although it will speak for itself. Do you know if you ever had any conversation with Mr. Clark after the altercation at the weigh station where you specifically told him that the

request that Clark return to work, the message that Hamilton left was that Clark call him to "*just work this out*." CX 19 (emphasis added). An offer to, in Hamilton's words, "get back to work" subject to "working things out" can hardly be interpreted as an *unconditional* offer that Clark return to work. However, regardless of how one interprets Hamilton's concluding remark, what is clear from Hamilton's voice message is that Hamilton, himself, understood Clark to no longer be in Respondent's employment. Why else would Hamilton state "I know there ain't no jobs out there man," express his concern that "I just don't want to see your little boy have to suffer," and offer Clark the opportunity to "get back to work"?

At best this case represents a situation in which there is no clear statement by Hamilton establishing Clark's employment status. As a result of Hamilton's conduct, we are confronted with ambiguity and confusion. That being so, ARB precedent and the case authority previously cited dictate that the test of Clark's employment status, of whether he was or was not discharged, "depends on the reasonable inferences" that Clark could draw from Hamilton's statements or conduct. *Jackson,* ARB No. 96-194, slip op. at 4. Hamilton's conduct, including the ambiguous nature of the voice mail he left for Clark, would logically lead any employee to reasonably believe that his employment had been terminated. Having created the ambiguity, it was Respondent's burden to prove otherwise. This Respondent has failed to do.

Accordingly, I would reverse the ALJ's decision herein appealed, as neither in accordance with law or supported by substantial evidence in the record as a whole, and remand the case for further proceedings on the merits.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

> deficiencies that were noted in Trooper Barnes's inspection report had been fixed?
> Hamilton: No.
> Question: And, of course, the tape will speak for itself, but did you ever have any communication with Mr. Clark after the altercation or the incident at the weigh station and after your cell phone message to him where you told Mr. Clark that he would not be required to drive an unsafe truck, where you specifically told him that?
> Hamilton: No.

D. & O. at 12 (quoting Hamilton's testimony, Tr. at 459).