



In the Matter of:

LINDELL BEATTY,

ARB CASE NO. 13-039

and

**ALJ CASE NOS. 2008-STA-020
2008-STA-021**

APRIL BEATTY,

DATE: May 13, 2014

COMPLAINANTS,

v.

INMAN TRUCKING MANAGEMENT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

E. Holt Moore, III, Esq.; *Law Office of E. Holt Moore, III*; Wilmington, North Carolina

For the Respondent:

Andrew J. Hanley, Esq.; *Crossley, McIntosh, Collier, Hanley & Edes, PLLC*; Wilmington, North Carolina

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

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 Supp. 2013), and its implementing regulations, 29 C.F.R. Part 1978 (2013). It is before the Administrative Review Board (ARB or the Board), on appeal, for the

third time.¹ Presented by this appeal is, effectively, the same question that was presented upon appeal from the Administrative Law Judge's (ALJ's) previous ruling in this case, of whether Respondent Inman Trucking Management, Inc. (Inman Trucking) "blacklisted" Complainants Lindell and April Beatty after Respondent terminated their employment because they engaged in STAA protected activities.

Following the Board's second remand of this case to the presiding Administrative Law Judge,² the ALJ issued a Decision and Order on Remand, dated February 7, 2013, in which the ALJ again rejected the Beattys' blacklisting claim and dismissed their complaint.³ For the following reasons, the ARB vacates the ALJ's February 7, 2013 Decision and Order (D. & O.), and remands this case to the ALJ for further proceedings consistent with this Decision.

FACTUAL BACKGROUND⁴

Complainants Lindell and April Beatty (the Beattys) worked as team truck drivers for Inman Trucking, a commercial motor carrier within the meaning of 49 U.S.C.A. § 31101, from August 2004 to December 2005, when Inman Trucking terminated their employment.⁵ Throughout their employment, the Beattys complained to Inman Trucking about, and on occasion refused to drive trucks to which they were assigned, because of the trucks' conditions.⁶

On October 29, 2005, the Beattys complained to Inman Trucking about an exhaust leak in the cab of the truck they were driving.⁷ No repairs were made at that time, and the Beattys continued with their haul assignment.⁸

¹ This case was previously before the ARB in *Beatty v. Inman Trucking Mgmt.*, ARB No. 09-032, ALJ Nos. 2008-STA-020, -021 (ARB June 30, 2010), and again in *Beatty v. Inman Trucking Mgmt.*, ARB No. 11-021, ALJ Nos. 2008-STA-020, -021 (ARB June 28, 2012).

² On June 28, 2012, the ARB remanded for the ALJ to make factual findings regarding: (1) whether the Beattys engaged in protected activity; (2) whether any protected activity was a contributing factor in the blacklisting; and (3) if it was a contributing factor, whether Inman Trucking established by clear and convincing evidence that it would have made the DAC report entries even if the Beattys had not engaged in protected activity. *Beatty*, ARB No. 11-021, slip op. at 8.

³ *Beatty v. Inman Trucking Mgmt.*, ALJ Nos. 2008-STA-020, -021 (ALJ Feb. 7, 2013), Decision and Order on Remand (D. & O. of Feb. 7, 2013, on Rem.).

⁴ The background statement is extracted from the factual findings and uncontested evidence set forth in the D. & O. of Feb. 7, 2013, on Rem., unless otherwise noted.

⁵ D. & O. of Feb. 7, 2013, on Rem. at 3, 4.

⁶ *Id.* at 5, 7.

⁷ *Id.* at 12.

On December 4, 2005, the Beattys complained to Inman Trucking about an exhaust leak and faulty muffler on a different truck they were driving.⁹ The exhaust leak repair was completed on December 6, 2005, before the Beattys continued their route.¹⁰

On or about December 14, 2005, Lindell Beatty met with Alan Grover, a safety director for Inman Trucking, at Inman Trucking's offices.¹¹ Following a heated exchange between the two men, Grover informed Beatty that Inman Trucking was terminating his and Mrs. Beatty's employment.¹² Within a day of terminating the Beattys' employment, Grover filled out a DAC report on the Beattys, which indicated that the Beattys had been discharged from employment.¹³ The report stated with regard to their work record: "Excessive Complaints, Company Policy Violation, Personal Contact Requested, Other."¹⁴

In August 2007, the Beattys applied to work for US Express but were pulled out of orientation and not hired.¹⁵ April Beatty testified that after US Express, they next tried to seek employment with Cargill Meats, but that they were told that they would not be hired due to their DAC report.¹⁶

Following the Beattys' filing of their OSHA complaint, on September 13, 2007, Grover sent an e-mail to the OSHA investigator in which he apologized to the Beattys, and stated that because of information that he had not previously been aware of, he was changing the DAC reports.¹⁷ Before the ALJ, Grover testified that he apologized and changed the DAC report to

⁸ *Id.* at 3, 4, 6, 12.

⁹ *Id.* at 6, 9, 10, 12, 13.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 5, 13.

¹² *Id.* at 7, 13; Hearing Transcript (Tr.) at 47, 62-63, 67-70, 138.

¹³ *Id.* at 7. A DAC report is a report that sets forth a truck driver's employment history, which is maintained by HireRight Solutions, Inc. (formerly known as USIS Commercial Services), a consumer reporting agency. *Canter v. Maverick Transp., LLC*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at 2 n.2 (ARB June 27, 2012).

¹⁴ D. & O. of Feb. 7, 2013 on Rem. at 8.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ Grover's email to OSHA (CX F) stated: "First let me offer both you and the Beattys a sincere apology for my obstinacy and stubbornness. I am sitting here in abject and red-faced shame. . . . While I was investigating the Beattys records here, I came across some information of which I

remove the negative information upon discovering, as a result of his further investigation during the course of the OSHA proceedings, that in fact the Beattys' complaints about the faulty muffler and exhaust leaks were valid.¹⁸ When he had originally entered the negative DAC information, he had thought that the Beattys had fabricated their December safety complaint.¹⁹

PRIOR PROCEEDINGS

On August 9, 2007, the Beattys filed a complaint with the Occupational Safety and Health Administration (OSHA). OSHA concluded that Inman Trucking did not issue the DAC report in retaliation for the Beattys having engaged in STAA-protected activity, and it dismissed the complaint. The Beattys filed objections to OSHA's determination and timely requested a hearing before the Office of Administrative Law Judges.

The presiding ALJ issued a decision dismissing the Beattys' complaints as untimely.²⁰ Upon appeal of the ALJ's initial decision, the ARB affirmed the ALJ's ruling with respect to the timeliness of the Beattys' claim concerning the termination of their employment, reversed the ALJ's timeliness ruling with respect to their claim of blacklisting, and remanded for the ALJ's further consideration of the blacklisting claim.²¹ On remand, the ALJ again dismissed the complaints because he found that the Beattys failed to prove that Inman Trucking blacklisted them.²² The Beattys again appealed to the ARB. The ARB concluded, upon review, that the uncontroverted evidence of record established that the negative information contained in the Beattys' DAC report constituted blacklisting. Accordingly, the ARB reversed the ALJ's second decision and remanded the case to the ALJ for a determination of whether the Beattys engaged in STAA-protected activity and, if so, whether the protected activity was a contributing factor in the DAC blacklisting.²³ On remand, the ALJ again dismissed the Beattys' complaint, having concluded that they failed to meet their burden of proving causation.²⁴ The Beattys again appealed, and the case is now before the ARB for the third time.

was not originally informed. Only on the basis of the new information, and in the interest of fairness, I am reversing my decision to stand and fight, and am changing the DAC reports for both of the Beattys”

¹⁸ Tr. at 159-61; CX F.

¹⁹ Tr. at 159.

²⁰ *Beatty v. Inman Trucking Mgmt.*, ALJ Nos. 2008-STA-020, -021 (ALJ Dec. 9, 2008).

²¹ *Beatty*, ARB No. 09-032 (June 30, 2010).

²² *Beatty v. Inman Trucking Mgmt.*, ALJ Nos. 2008-STA-020, -021 (ALJ Dec. 2, 2010).

²³ *Beatty*, ARB No. 11-021 (June 28, 2012).

²⁴ D. & O. of Feb. 7, 2013, on Rem.

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.²⁵ In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole.²⁶ The ARB reviews the ALJ's conclusions of law de novo.²⁷

DISCUSSION

In *Beatty*, ARB No. 11-021, the Board held that the negative information that Inman Trucking placed in the Beattys' DAC report constituted "blacklisting," i.e., the dissemination of damaging information about the Beattys that would or could prevent them from finding employment.²⁸ Accordingly, the Board reversed the ALJ's Decision and Order on Remand of December 2, 2010, and remanded the case to the ALJ to determine whether the Beattys engaged in whistleblower protected activity under STAA and, if so, whether such protected activity was a contributing factor in the blacklisting.

On remand, the ALJ found that the Beattys engaged in STAA whistleblower-protected activity when they complained to Respondent in October 2005 about an exhaust leak in the cab of the truck they were driving, and subsequently reported, in early December, that the truck they were then driving had a damaged muffler in need of repair.²⁹ Based on the ARB's conclusion that the DAC entry constituted blacklisting, the ALJ also found that the Beattys were subject to adverse employment action.³⁰ Nevertheless, the ALJ denied the Beattys' claim of STAA-

²⁵ 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).

²⁶ 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). In conducting our review, the ARB will 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 the Board "would justifiably have made a different choice" had the matter been before us de novo." *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007) (quoting *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006)).

²⁷ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004) (citations omitted).

²⁸ *Beatty*, ARB No. 11-021, slip op. at 6-7.

²⁹ D. & O. of Feb. 7, 2013, on Rem. at 12-13.

³⁰ *Id.* at 12.

prohibited retaliation and dismissed their complaint, having determined that the Beattys “failed to establish a causal relationship between the protected activity and the adverse employment action.”³¹

In concluding that there was no causation, the ALJ imposed a burden of proof upon the respective parties and engaged in a burden-shifting analysis first requiring the Beattys to establish a “*prima facie* case” of retaliation. The ALJ held that the Beattys established, through evidence of proximity in time between the protected activity and the adverse employment action, and knowledge of the protected activity on the part of Inman Trucking, “the inference that the exhaust leak complaint caused the filing of a negative DAC report.”³² The ALJ then shifted the burden to Inman Trucking to rebut the Beattys’ *prima facie* showing by articulating a legitimate, non-discriminatory reason for taking the adverse action.³³ This, the ALJ concluded, Inman Trucking successfully did by asserting that the negative report was issued because the Beattys had a history of complaining about the dirtiness and size of the trucks they had to drive and because they failed to drive three trips each month.³⁴ Having articulated legitimate, non-discriminatory reasons for the negative reports, the ALJ returned the burden to the Beattys to establish by a preponderance of the evidence that Inman Trucking’s articulated reasons were mere pretext.³⁵ Concluding that the Beattys failed to meet this burden of proving pretext, the ALJ found that “the record does not support the Beattys’ contention that their safety complaints were the cause of their termination and related DAC reports.”³⁶ Accordingly, the ALJ dismissed the Beattys’ complaint for “fail[ing] to establish a causal relationship between the protected activity and the adverse employment decision.”³⁷

Notwithstanding the ARB’s articulation of the burdens of proof standards applicable under STAA in its June 28, 2012 Decision and Order of Remand,³⁸ in reaching his conclusion that the Beattys failed to prove causation, the ALJ erroneously cited to and relied upon case

³¹ *Id.* at 14.

³² *Id.* at 13.

³³ *Id.*

³⁴ *Id.* Grover testified that Inman Trucking company policy required that drivers make three trips per month to be considered full-time employees, and that the Beattys only made two trips per month between June 15, 2005, and December 14, 2005, in violation of company policy. D. & O. of Feb. 7, 2013, on Rem. at 6.

³⁵ *Id.* at 14.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Beatty*, ARB No. 11-021, slip op. at 5.

authority derived from Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.*, governing the parties' respective burdens of proof and the analytical framework in which the parties' respective burdens are evaluated.³⁹ The case law upon which the ALJ relied articulates the parties' respective burdens of proof under Title VII and the burden shifting paradigm by which each party presents its evidence to meet their respective burdens, as first articulated in *McDonnell Douglas Corp. v. Green*.⁴⁰ In *McDonnell Douglas*, the Supreme Court set forth the basic allocation of burdens of proof and, secondly, the order of presentation of such proof in Title VII cases alleging discriminatory treatment.⁴¹ This Title VII body of law was incorporated into STAA as early as 1984 with the Secretary of Labor's decision in *Nix v. Nehi-RC Bottling Co., Inc.*,⁴² and by the ARB in *Byrd v. Consol. Motor Freight*.⁴³

Prior to the 2007 amendments to STAA adopted as part of the 9/11 Commission Act of 2007,⁴⁴ the burden of proof framework the ALJ relied upon, which was developed for pretext analysis under Title VII and other discrimination laws, was controlling. However, as the Board pointed out in *Salata v. City Concrete, LLC*,⁴⁵ the 2007 legislation replaced the *McDonnell Douglas* Title VII burden of proof standards and burden-shifting analytical framework in STAA cases by incorporating the legal burdens of proof and framework imposed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.⁴⁶ The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to expressly provide that STAA

³⁹ The ALJ specifically cited to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-11 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987); *Simpkins v. Rondy Co., Inc.*, ARB No. 02-097, ALJ No. 2001-STA-059 (ARB Sept. 24, 2003); *Somerson v. Yellow Freight System*, ARB No. 99-004, ALJ No. 1998-STA-009 (ARB Feb. 18, 1999); *Byrd v. Consol. Motor Freight*, ARB No. 98-064, ALJ No. 1997-STA-009 (ARB May 5, 1998); *Stiles v. J.B. Hunt Transp., Inc.*, No. 1992-STA-034 (Sec'y Sept. 24, 1993); *Ertel v. Giroux Bros. Transp., Inc.*, No. 1988-STA-024 (Sec'y Feb. 16, 1989).

⁴⁰ 411 U.S. 792, 802-804 (1973).

⁴¹ See also *St. Mary's Honor Center*, 509 U.S. at 506; *Burdine*, 450 U.S. at 252-253.

⁴² No. 1984-STA-001 (Sec'y July 13, 1984).

⁴³ ARB No. 98-064, ALJ No. 1997-STA-009 (ARB May 5, 1998). See also *Moon v. Transp. Drivers*, 836 F.2d at 229; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-015 (ARB Aug. 1, 2002); *Madonia v. Dominick's Finer Food, Inc.*, ARB No. 00-003, ALJ No. 1998-STA-002 (ARB July 26, 2002).

⁴⁴ Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act) (August 7, 2007).

⁴⁵ ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-012, -041 (ARB Sept. 15, 2011).

⁴⁶ Pub. L. No. 106-181, 114 Stat. 61 (AIR 21) (Apr. 5, 2000).

whistleblower complaints are governed by the legal burdens of proof set forth at 49 U.S.C.A. § 42121(b), which provides whistleblower protection for employees in the aviation industry. Under the AIR 21 standard, a new burden of proof framework is established in which the complainant is initially required to show by a preponderance of the evidence that protected activity was a “contributing factor” in the alleged adverse personnel action.⁴⁷ Should the complainant meet the “contributing factor” burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant’s showing, to prove by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected conduct.⁴⁸

The AIR 21 burden of proof framework is far more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard. As the Federal Circuit explained in *Marano v. Dep’t of Justice*,⁴⁹ the “contributing factor” standard was “intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.”⁵⁰ The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent’s reason for the unfavorable personnel action was pretext, or that the complainant’s activity was the sole or even predominant cause.⁵¹ The complainant “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination.”⁵² A “contributing factor,” the ARB has repeatedly noted, is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.”⁵³ Thus, for example, a complainant may prevail by proving that the respondent’s reason, “while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant’s] protected activity.”⁵⁴ Moreover, the complainant can

⁴⁷ 49 U.S.C.A. § 42121(b)(2)(B)(iii); *see also* 75 Fed. Reg. 53545, 53550.

⁴⁸ 49 U.S.C.A. § 42121(b)(2)(B)(iv); 75 Fed. Reg. 53545, 53550.

⁴⁹ 2 F.3d 1137 (Fed. Cir. 1993) (interpreting similar provisions of the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)).

⁵⁰ *Id.* at 1140.

⁵¹ *Id.* at 1141; *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006).

⁵² *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

⁵³ *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008).

⁵⁴ *Henrich*, ARB No. 05-030, slip op. at 10; *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18-19 (ARB May 31, 2006).

succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.⁵⁵

If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability, to prove “by clear and convincing evidence” that it would have taken the same adverse action in any event.⁵⁶ “The ‘clear and convincing evidence’ standard is the intermediate burden of proof, in between ‘preponderance of the evidence’ and ‘proof beyond a reasonable doubt.’ To meet the burden, the employer must show that ‘the truth of its factual contentions is highly probable.’”⁵⁷ Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.”⁵⁸

We recognize that the ARB has sanctioned use of the Title VII analytical framework in past opinions.⁵⁹ The language of these decisions was intended to leave intact the analytical framework established under Title VII for analyzing the parties’ respective burdens of proof notwithstanding the legislative substitution of new burdens of proof standards. In retrospect, however, it is clear that maintaining the Title VII analytical methodology has given rise to confusion regarding the burdens of proof required of the parties, as evidenced by the ALJ’s decision in this case. It is also clear that leaving the Title VII analytical methodology in place

⁵⁵ *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). “Direct evidence is ‘smoking gun’ evidence that conclusively links the protected activity and the adverse action and does not rely upon inference.” *Sievers*, ARB No. 05-109, slip op. at 4-5. Circumstantial evidence may include temporal proximity, pretext, inconsistent application of policies, an employer’s shifting or contradictory explanations for its actions, antagonism or hostility toward a complainant’s protected activity, or a change in the employer’s attitude toward the complainant after he or she engages in protected activity. *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13, 28 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

⁵⁶ *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

⁵⁷ *Araujo*, 708 F.3d at 159 (citations omitted).

⁵⁸ *Williams*, ARB No. 09-092, slip op. at 5 (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citation omitted)).

⁵⁹ *See, e.g., Brune*, ARB No. 04-037, slip op. at 14 (“This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases.”); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 6 (ARB Sept. 30, 2003) (“Nor do the 1992 amendments [to the ERA] dictate or suggest that an ALJ, or this Board, not rely, when appropriate, upon the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof.”).

was legal error on the ARB's part because, as the federal appellate courts have recognized,⁶⁰ the statutory adoption of the new burdens of proof was coupled with a new analytical framework.

The Title VII framework imposes a three-step analytical process, beginning by requiring from the complainant an initial "prima facie" showing which, if met, is followed by a rebuttal showing by the respondent which, if met, returns the ultimate burden of proof again to the complainant. The STAA amendments instead impose a two-step analytical process that focuses first on whether the complainant has met his burden of establishing that protected activity was a "contributing factor," which entitles the complainant to relief unless the respondent can establish in rebuttal, by "clear and convincing evidence," that it would have taken the same adverse personnel action had there been no protected activity.

The Eleventh Circuit was the first of the appellate courts to recognize this critical distinction. In *Stone & Webster Eng'g Corp. v. Herman*,⁶¹ the court explained that the 1992 Congressional amendments to the whistleblower protection provisions of the Energy Reorganization Act (42 U.S.C.A. § 5851)⁶² sought "to codify a particular framework regarding burdens of proof where no statutory guidance existed before."⁶³ The Eleventh Circuit pointed out that reference to a "prima facie showing" caused confusion because it evokes the *McDonnell Douglas* Title VII framework, whereas "Section 5851 [of the amended ERA] is clear and supplies its own free-standing evidentiary framework."⁶⁴ In 1999, the Tenth Circuit had the opportunity to visit this issue, again addressing the 1992 amendments to the ERA, stating in *Trimmer v. U.S. Dep't of Labor*,⁶⁵ "In 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973)."⁶⁶

Addressing the AIR 21 burdens of proof, the Second, Third, and Fifth Circuits have similarly recognized that AIR 21's analytical framework is significantly different from and

⁶⁰ See discussion, *infra*.

⁶¹ 115 F.3d 1568 (11th Cir. 1997).

⁶² The AIR 21 burdens of proof standards incorporated into the STAA whistleblower provision at 49 U.S.C.A. § 31105(b)(1) were themselves modeled after the burdens of proof provisions of the 1992 amendments to the ERA. See *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

⁶³ 115 F.3d at 1572 (citations omitted).

⁶⁴ *Id.*

⁶⁵ 174 F.3d 1098 (10th Cir. 1999).

⁶⁶ *Trimmer*, 174 F.3d at 1101 (footnote omitted). *Accord Williams v. Admin. Review Bd.*, 376 F.3d 471, 476 (5th Cir. 2004).

independent of the *McDonnell Douglas* framework. The Fifth Circuit was the first to recognize this, in *Allen v Administrative Review Board*,⁶⁷ a case arising under the whistleblower protection provisions of the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A, which like STAA expressly incorporates the AIR 21 burdens of proof standards. In *Allen*, the Fifth Circuit noted that the “‘independent burden-shifting framework’ [of SOX/AIR 21] is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claims.”⁶⁸ Similarly, the Third Circuit in *Araujo* recognized that under AIR 21 Congress set forth, in place of the *McDonnell Douglas* burden-shifting framework, “a two-part burden-shifting test.”⁶⁹ As this court explained, the congressional imposition of this alternative burden-shifting framework is significant:

[I]f a statute does not provide for a burden-shifting scheme, *McDonnell Douglas* applies as the default burden-shifting framework. See *Doyle v. United States Sec’y of Labor*, 285 F.3d 243, 250 (3d Cir. 2002). This implies that when a burden-shifting framework other than *McDonnell Douglas* is present in a statute, Congress specifically intended to alter any presumption that *McDonnell Douglas* is applicable.^[70]

Recently confronted with an ALJ’s application of the *McDonnell Douglas* Title VII burdens of proof and analytical framework to a SOX whistleblower claim, the Second Circuit was resolute, mincing no words: “The ALJ’s alternative burden-shifting scheme has no basis in any relevant law or regulation, and is simply incorrect.”⁷¹ The Second Circuit’s admonition is equally applicable to the present case. The ALJ’s application of the *McDonnell Douglas* burdens of proof and analytical framework to the Beattys’ STAA claim has no basis in law or regulation. It is simply incorrect.

Ordinarily where, as here, the Board determines that the ALJ failed to apply the proper burdens of proof, we would remand to the ALJ for further proceedings on the issue of causation consistent with our ruling. However, in light of the uncontroverted evidence in this case, remand for a determination of “contributing factor” causation is unnecessary.⁷² The ALJ found that the

⁶⁷ 514 F.3d 468 (5th Cir. 2008).

⁶⁸ *Id.* at 476.

⁶⁹ 708 F.3d at 157.

⁷⁰ *Id.* at 157-158.

⁷¹ *Bechtel v. Admin. Review Bd., U.S. Dep’t of Labor*, 710 F.3d 443, 448 (2d Cir. 2013).

⁷² See *Hussain v. Gonzales*, 477 F.3d 153 (4th Cir. 2007) (when the result of a remand is a foregone conclusion amounting to a mere formality, the “rare circumstances” exception to the remand rule is met and remand is unwarranted); *Zhong v. U.S. Dep’t of Justice*, 461 F.3d 101, 113 (2d Cir. 2006) (stating that an agency error does not warrant remand when it is clear from the record “that the same decision is inevitable on remand, or, in short, whenever the reviewing panel is

Beattys engaged in STAA-protected whistleblower activity, which determination is not challenged on appeal. The only issues remaining in this case are whether the evidence of record supports finding that the Beattys have proven by a preponderance of the evidence that their protected activity was a contributing factor in Respondent's decision to place negative information in the Beattys' DAC report and, if so, whether Inman Trucking can demonstrate by clear and convincing evidence that it would have placed that information in the DAC reports even if the Beattys had not engaged in STAA-protected activity.

Applying the proper "contributing factor" burden of proof standard, it is clear from the uncontested evidence that the Beattys meet their burden of proving by a preponderance of the evidence that their protected complaints about the exhaust leaks and faulty muffler were a contributing factor in Inman Trucking's decision to enter negative information in the Beattys' DAC report. There is, initially, the inference of causation that is to be drawn based on the temporal proximity of the Beattys' protected activities to the DAC reports. The Beattys made their second complaint about exhaust leaks on or about December 4, 2005, and the negative DAC report entries were made ten days later, on December 14, 2005.⁷³ The ALJ also cited Grover's testimony "that nine out of ten times the Beattys complained about the cleanliness of the trucks and not about safety," in explaining the entry of "excessive complaints" contained in the DAC report.⁷⁴ From this admission that at least one tenth of the time the Beattys' complaints were about truck safety, the inference can safely be drawn that the "excessive complaints" of concern to Inman Trucking would have included the Beattys' complaints about the exhaust leaks.

However, no evidence speaks more clearly in support of the conclusion that the Beattys' protected activity was a contributing factor in the DAC report than Grover's explanation as to why he removed the offending language from the Beattys' DAC report. As previously noted, the evidentiary record indicates that subsequent to the Beattys' filing of their OSHA complaint, Grover apologized to the Beattys and agreed to remove the negative information from their DAC report after he discovered, upon further investigation on his part, that the exhaust leaks of which the Beattys had complained had in fact occurred.⁷⁵ The fact that Grover, upon learning that the Beattys' exhaust leak complaints were valid, apologized and removed the offending entries from their DAC report constitutes tacit acknowledgment on Grover's part that the Beattys' exhaust leak complaints were a factor in Grover's decision to submit the negative entries. However, that Grover believed at the time he submitted the defamatory DAC report that the Beattys were lying did not make their complaints about an exhaust leak any less protected.⁷⁶

confident that the agency would reach the same result upon a reconsideration cleansed of errors") (citation omitted).

⁷³ D. & O. of Feb. 7, 2013, on Rem. at 13.

⁷⁴ *Id.* at 7.

⁷⁵ Tr. at 159-60.

⁷⁶ *Elbert v. True Value Co.*, ARB No. 07-031, ALJ No. 2005-STA-036, slip op. at 3 n.5 (ARB Nov. 24, 2010) ("[A] 'mistaken but sincere' defense has no place in STAA jurisprudence; an employer may not escape liability for discharging an employee for protected activity merely by

The preponderance of the evidence thus supports the inescapable conclusion that the Beattys' STAA-protected complaints contributed to Grover's decision to enter the offending negative comments into the Beattys' DAC report.

CONCLUSION

Although the evidence thus supports finding that the Beattys have met their burden of proving that their complaints were a contributing factor in Inman Trucking's decision to place negative entries on their DAC report, we must again remand this matter to the ALJ. This time, we remand for the ALJ to determine whether Inman Trucking can prove, by clear and convincing evidence, that it would have made the same entries in the Beattys' DAC report had the Beattys not made the STAA-protected safety complaints.

Upon remand, the evidentiary burden on Respondent is high. As the Eleventh Circuit has remarked, "[f]or employers, this is a tough standard, and not by accident. Congress appears to have intended that companies . . . face a difficult time defending themselves."⁷⁷ The ALJ must determine whether the evidence of record supports finding that it is highly probable or reasonably certain that Inman Trucking would have made the negative DAC report entries even if the Beattys had not engaged in their protected activity. If the evidence of record supports such a conclusion, the Beattys will not be entitled to relief. If, on the other hand, the evidence of record does not clearly and convincingly establish that Respondent would have made the same entries in the Beattys' DAC report had they not engaged in whistleblower protected activity, the ALJ must then address on remand the issue of damages.

Accordingly, the ALJ's Decision and Order is **REVERSED IN PART** to the extent that the ARB finds, based on the uncontroverted evidence of record, that the Beattys' protected activity was a contributing factor in Respondent's decision to make the negative entries in the Beattys' DAC report. The case is **REMANDED** to the ALJ for consideration, consistent with this Decision

claiming a "mistaken but sincere" belief that the employee's safety complaint was groundless. An employee's complaint based upon a reasonable, albeit mistaken, belief that a potential or actual violation of a commercial motor vehicle safety regulation under 49 U.S.C.A. § 31105(a)(1)(A)(i) has occurred is sufficient to establish protected activity. See *Guay v. Burford's Tree Surgeons, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045, slip op. at 7 (ARB June 30, 2008); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002), *aff'd sub nom Harrison v. Admin. Review Bd.*, 390 F.3d 752, 759 (2d Cir. 2004) (citing *Dutkiewicz v. Clean Harbors Env'tl. Servs., Inc.*, ARB No. 97-090, ALJ No.1995-STA-034, slip op. at 3-4 (ARB Aug. 8, 1997)), *cited with approval in Clean Harbors Env'tl. Servs., Inc.*, 146 F.3d 12, 19 (1st Cir. 1998). Accordingly, protection is not dependent upon the employer's belief in the accurateness of the employee's complaint. The primary consideration is assuring the right of employees to raise concerns, not the accuracy of those complaints. See *Passaic Valley Sewerage Comm'rs v. U. S. Dep't of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993)").

⁷⁷ *Stone & Webster Eng'g Corp.*, 115 F.3d at 1572.

and Order of Remand, of whether Inman Trucking can establish by clear and convincing evidence that it would have issued the negative DAC report even if the Beattys had not engaged in the STAA-protected activity and, if not, for an award of damages.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge