In the Matter of:

JAQUENETTE DHO-THOMAS,

COMPLAINANT,

v.

PACER ENERGY MARKETING,

RESPONDENT.

ARB CASE NO. 13-051

ALJ CASE NOS. 2012-STA-046
2012-TSC-001

DATE: May 27, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Jaquenette Dho-Thomas, *pro se*, Lewisburg, Tennessee

For the Respondent:
Steven A. Broussard, Esq., *Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, Tulsa, Oklahoma

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, concurring.

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2014), and its implementing regulations, 29 C.F.R. Part 1978 (2014) and the Toxic Substances Control Act of 1986 (TSCA), 15 U.S.C.A. § 2622 (Thomson/Reuters 2009) and its implementing regulations, 29 C.F.R. Part 24 (2014). Jaquenette Dho-Thomas filed a complaint alleging that Pacer Energy Marketing (Pacer) retaliated against her in violation of the STAA and TSCA's whistleblower protection provisions. Dho-Thomas appeals from a Decision and Order (D. & O.) issued by a Department

of Labor Administrative Law Judge (ALJ) on March 18, 2013, dismissing Dho-Thomas's complaint after a hearing on the merits. We summarily affirm the ALJ's dismissal of Dho-Thomas's whistleblower complaint.[1]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in TSCA and STAA cases.[2] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[3]

DISCUSSION

In her D. & O., the ALJ thoroughly considered the evidence of record and the contentions of the parties regarding the essential elements of Dho-Thomas's STAA and TSCA claims: protected activity, adverse action, and a causal link.[4] We affirm the ALJ's findings.

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[1] While we affirm the ALJ's dismissal of Dho-Thomas's claim, we do not endorse every collateral legal issue in the ALJ's legal analysis. For example, the ALJ ruled that Dho-Thomas's disclosures to Mr. Reid, an employee at Enterprise (Pacer's largest customer and a trade partner) were not covered because, among other reasons, Reid was not Dho-Thomas's employer or supervisor. D. & O. at 40. However, given the requisite broad construction of remedial whistleblower law, we do not rule out entertaining protection for disclosures to third-party non-employers under certain circumstances. *Cf. Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1575 (11th Cir. 1997) (ERA may protect expression of safety related concern to co-worker when viewed in context: "The important question, however, is . . . whether he was acting in furtherance of safety compliance when he spoke to the co-workers.").

[2] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a), 29 C.F.R. § 24.110(a).

[3] 29 C.F.R. § 1978.110(b); 29 C.F.R. § 24.110(b); *Stachowski v. Rupp Masonry, Inc.*, ARB No. 09-062, ALJ No. 2009-TSC-001, slip op. at 2 (ARB Nov. 30, 2010).

[4] Dho-Thomas's STAA claim is governed by the legal burdens of proof set forth in section 42121(b), which require at (2)(B)(iii), that "the complainant demonstrate[] that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C.A. § 31105(b)(1). Dho-Thomas's TSCA claim however, requires that she "demonstrate[] by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2).

1. STAA

Substantial evidence supports the ALJ's factual findings and her ultimate conclusion that Dho-Thomas failed to prove by a preponderance of the evidence that she "engaged in any activity that could be characterized as 'protected activity' under the STAA."[5]

2. TSCA

In concluding that Dho-Thomas failed to prove a causal relationship between TSCA-protected activity and her employment termination, the ALJ appears to have applied the "contributing factor" standard of causation required of a complainant under STAA and various other whistleblower protection statutes.[6] As noted at footnote 4, *supra*, under the TSCA a complainant is required, instead, to prove "by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2). The TSCA "motivating factor" test imposes a more demanding standard of causation upon the complainant than the "contributing factor" test invoked by the ALJ. The ALJ's error is harmless in this matter, however, because if a complainant cannot meet the lesser "contributing factor" standard, the complainant surely will not meet the heightened causation standard under the TSCA. Indeed, our reconsideration of Dho-Thomas's evidence of causation under the heightened standard confirms this. The substantial evidence of record supports the conclusion that Dho-Thomas failed to prove by a preponderance of the evidence that her alleged protected activity caused or was a motivating factor in the Respondent's decision terminating her employment. None of the arguments Dho-Thomas presented on appeal persuade us otherwise.

3. Dho-Thomas's Motion for Extraordinary Action by the Board

On April 25, 2013, Dho-Thomas filed a motion with the Board "to bring forth some additional documents, not for new evidential issues, but for clarity on topics and discussions already of record." Motion at 1. Pacer objected to these additional documents arguing that the Board should not consider them.

We treat Dho-Thomas's motion as a motion to reopen the evidentiary record pursuant to 29 C.F.R. § 18.54(c) (2014). Under 29 C.F.R. § 18.54(c), once the ALJ closes the record, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." We "ordinarily rel[y] upon this standard in determining whether to consider new

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[5] D. & O. at 36.

[6] *See, e.g.,* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b)(2)(B)(iii).

evidence, i.e., any evidence that is submitted after the ALJ has closed the record."[7] Dho-Thomas has not shown that the evidence she asks the Board to consider is new or material: what is more, she confirms that the evidence is not new, stating that Pacer wrote the materials in the course of this action and they were "already submitted to OSHA's file."[8] Accordingly, we deny Dho-Thomas's motion for extraordinary action by the Board.

CONCLUSION

The ALJ's Decision and Order dismissing Dho-Thomas's claims is **AFFIRMED.**

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado, concurring:

I concur in the result and write separately to make clear the basis for my concurrence. I agree to affirm because the ALJ expressly rejects causation by looking at all of the evidence in the record. It is undisputed in this case that protected activity occurred on December 15, 2010, and the adverse action of termination occurred on December 28, 2010, less than two weeks later.[9] This is indisputably close temporal proximity. The ALJ implicitly recognizes the close temporal proximity but rejects an inference of causation *only* because the employer credibly explained it had other reasons for the adverse actions.[10] In affirming the ALJ's ruling on causation, the majority necessarily approves of the ALJ's rejection of the significance of the 13-

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[7] *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 12 (ARB Sept. 28, 2007).

[8] Dho-Thomas's Response to Respondent's Opposition to Motion for Extraordinary Action of the Board, at 1 (May 29, 2013).

[9] D. & O. at 1, 37-38.

[10] See D. & O. at 44 ("But even if the proximity of the Complainant's protected activity to her termination, standing alone, were sufficient to raise an inference that her termination was related to her report . . . .").

day temporal proximity and that she rejects this temporal proximity by looking at the employer's reasons for terminating Dho-Thomas's employment. The majority's ruling in this case and other cases make clear that, whether the causation standard is "motivating factor," as in this case or "contributing factor,"[11] a complainant does not *automatically* prove causation by relying solely on timing (short temporal proximity) and knowledge of protected activity; it is a case-by-case determination dependent on the facts of the case. In any event, I affirm the dismissal because, considering Dho-Thomas's evidence, together with the employer's substantial evidence, supports the ALJ's ultimate conclusion that Dho-Thomas's protected activity was not a motivating factor in the termination of her employment.[12]

LUIS A. CORCHADO
Administrative Appeals Judge

[11] For a case involving "contributing factor," see *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) (in which the Board affirmed a summary dismissal even though the protected activity and termination occurred only *three days* apart); see also *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012) (no causation even though temporal proximity was less than two months).

[12] I have some concerns about the ALJ's ambiguous language that arguably suggests legitimate reasons alone can erase the significance of very close temporal proximity in cases that permit a finding that dual or multiple reasons had a role in causation. In other words, both the contributing factor and motivating factor causation standards require proof that protected activity played a part in the employer's decision-making process. This means that protected activity and legitimate reasons can co-exist under either standard; they are not mutually exclusive as a matter of law. In the end, I conclude that overall the ALJ found the counter-evidence of causation to be "overwhelmingly" against Dho-Thomas, that non-retaliatory reasons led to her being fired, and that protected activity played no role in that decision, looking at the record as a whole. D. & O. at 44.