



In the Matter of:

DONNY G. KIRK,

ARB CASE NO. 14-035

COMPLAINANT,

ALJ CASE NO. 2013-STA-042

v.

DATE: November 18, 2015

ROONEY TRUCKING INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Donny Kirk, *pro se*, Odessa, Missouri

Formerly for the Respondent:

Stuart D. Wieland, Esq., *The Law Office of Stuart D. Wieland, L.C.*, Kansas City, Missouri

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2015), and its implementing regulations, 29 C.F.R. Part 1978 (2015). Donny Kirk filed a complaint alleging that Rooney Trucking, Inc. retaliated against him in violation of the STAA's whistleblower protection provisions. Rooney Trucking appeals from a Decision and Order (D. & O.) issued on February 12, 2014, by a Department of Labor Administrative Law Judge (ALJ), finding in Kirk's favor after a hearing on the merits.

BACKGROUND

Kirk began working as a truck driver for Rooney Trucking on August 22, 2012.¹ Kirk called Rooney Trucking the evening of Thursday, December 13, 2012, to inform it that he was violently ill and that he thought he would be unable to drive in the morning. He described to Rooney Trucking that he had been vomiting and was forced to get off of the phone because he was vomiting. Kirk also had a fever. Kirk called Rooney Trucking again the next day, Friday, December 14, 2012, and left a phone message to tell them that he was still ill. Kirk's symptoms of vomiting and fever continued until the afternoon of Saturday, December 15, 2012.

Rooney Trucking laid Kirk off on December 17, 2012.^{2,3} Kirk's application for employment had a note on it indicating that Kirk was laid off on December 14, 2012. Rooney Trucking asserted that it laid Kirk off because of his failure to report to work from December 15, 2012, to December 18, 2012. Rooney Trucking also offered an alternate explanation that it laid Kirk off because of a policy about absences. According to Rooney Trucking, it had a policy to lay off employees who have been absent, without pay, for more than three days. Under this policy, Kirk should have been able to return to work on December 18, 2012.

Kirk began looking for a new job on December 17, 2012, the day Rooney Trucking laid him off.⁴ He filed his complaint in this matter on December 18, 2012.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to this Board to issue final agency decisions in STAA cases.⁵ The ARB reviews questions of law presented on appeal de novo, but

¹ The references in this paragraph are to D. & O. at 3, 5, 11-13.

² While the ALJ stated that the evidence showed that Kirk was laid off December 14, or December 17, the ALJ also found that the termination date was December 17, 2012, because this was supported by the telephone records. D. & O. at 14, 15, 16-17.

³ The references in this paragraph are to D. & O. at 14-17.

⁴ D. & O. at 6.

⁵ 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).

is bound by the ALJ's factual determinations if they are supported by substantial evidence.⁶ We uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."⁷

DISCUSSION

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.⁸ Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).⁹

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.¹⁰ Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.¹¹

The ALJ found that Kirk engaged in protected activity when he refused to drive while experiencing flu-like symptoms because an actual violation of the fatigue rule would have occurred had he driven and because Kirk had a reasonable apprehension of serious injury to the employee or the public if he drove in his condition. The ALJ further found that Kirk's protected activity contributed to Rooney Trucking's decision to terminate Kirk's employment and that Rooney Trucking failed to prove by clear and convincing evidence that it would have terminated his employment absent protected activity. While we do not express an opinion on every part of the decision, we affirm and add limited discussion.

⁶ 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citation omitted).

⁷ *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

⁸ 49 U.S.C.A. § 31105(a)(1).

⁹ 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson/West 2007).

¹⁰ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

¹¹ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

Rooney Trucking argues that Kirk did not engage in protected activity because Kirk did not introduce any evidence to demonstrate that his driving ability would have been so impaired that an actual violation would have occurred or that his illness impaired his ability to drive as to make operation unsafe. Respondent objects that Kirk did not tell it that he could not safely drive his run because of his illness. Substantial evidence supports that Kirk refused to drive while he was ill and that it would have both 1) violated a federal regulation for him to drive and 2) impaired his ability to drive so as to make operation unsafe (and Kirk had a reasonable apprehension that this was the case). The ALJ found that Kirk credibly testified that he was sufficiently impaired such that his operation of his truck would have violated the fatigue rule.¹² She also found that Kirk adequately informed Rooney Trucking that it would be unsafe for him to drive.¹³ The ALJ noted that Rooney Trucking did not express any doubt about the accuracy of Kirk's statements as to the severity of his condition.¹⁴ Substantial evidence in the record supports the ALJ findings that Kirk engaged in STAA-protected activity.

We reject Respondent's argument that it took no adverse action against Kirk. Respondent makes much of Kirk's testimony at the hearing that Kirk thought the reason for his layoff was obvious as support for its position that Kirk quit his employment. But this statement could mean many things—including that he believed that they fired him because he called in sick—and does not necessarily support Respondent's position. Respondent also argues that because Kirk began looking for other work on December 17, 2012, it evidenced that Kirk did not want to work for Rooney Trucking any longer. As the ALJ found that Rooney Trucking terminated Kirk's employment on December 17, 2012, that he started looking for work that day simply shows that Kirk began his job search as soon as he was laid off. Substantial evidence supports the ALJ's finding of adverse action.

Rooney Trucking challenges the ALJ's factual finding of causation by arguing that it terminated Kirk's employment for a legitimate, non-retaliatory reason "as the Secretary found at the OSHA level." Respondent's position is that it had to give other drivers Kirk's work schedule because Kirk failed to appear for work on December 15, 17, and 18, 2012, and that there was no nexus between Kirk's calling in sick and his layoff. The ALJ found that Rooney Trucking laid off Kirk at least in part because he refused to drive a commercial motor vehicle while experiencing flu-like symptoms.¹⁵ Substantial evidence in the record supports the ALJ's finding that Kirk's protected activity contributed to the adverse action Rooney Trucking took against him.

¹² D. & O. at 12.

¹³ *Id.* at 13.

¹⁴ *Id.*

¹⁵ *Id.* at 16.

Regarding Respondent's affirmative defense to prove that it would have taken the same action absent protected activity, Rooney Trucking simply argues in its brief that because Kirk did not prove causation, the burden never shifted to it to make this demonstration. As we have affirmed the ALJ's causation finding, this argument fails. Additionally, in addressing the Respondent's affirmative defense, the ALJ's ruling that Respondent's explanation as to its basis for terminating Kirk's employment was not persuasive is supported by substantial evidence in the record.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's award ordering reinstatement, back pay until reinstatement, and pre- and post-judgment interest.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge