In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY,

and

TIMOTHY J. BAILEY,

COMPLAINANT,

v.

KOCH FOODS, LLC,

RESPONDENT.

ARB CASE NO. 14-041

ALJ CASE NO. 2008-STA-061

DATE: May 30, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Charles F. James, Esq.; Tremelle I. Howard-Fishburne, Esq.; Channah S. Broyde, Esq.; Stanley E. Keen, Esq.; and Carol A. DeDeo, Esq.; *United States Department of Labor*, Washington, District of Columbia

For the Respondents:
Larry Stine, Esq.; and Elizabeth K. Dorminey, Esq.; *Wimberly, Lawson, Steckel, Schneider & Stine, P.C.;* Atlanta, Georgia

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

ORDER OF REMAND

Timothy Bailey filed a complaint under the whistleblower protection provision of the Surface Transportation Assistance Act,[1] and its implementing regulations.[2] He alleged that his former employer, Respondent Koch Foods, LLC, suspended and then fired him in retaliation for his refusal to haul a trailer he believed violated state and federal statutes regarding the weight of tractor-trailers and because he believed hauling the trailer could result in an accident and personal injury. The Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on September 29, 2009, finding that Bailey established that Koch Foods discriminated against him in violation of the Act when it terminated his employment and that Koch Foods did not show that it would have terminated him in the absence of his protected activity. The ALJ recommended that Bailey be reinstated, but noted that he had secured alternative employment and did not want to return to his position at Koch Foods. Thus, the ALJ awarded back pay from July 27, 2007, to December 22, 2007. To reflect Bailey's reduced salary at the alternative employment, the ALJ awarded $339.24 per week from December 23, 2007, to August 25, 2008, the date Koch Foods offered Bailey reinstatement, plus interest. In addition, the ALJ awarded $8,000 in compensatory damages. Respondent filed a timely appeal of the ALJ's R. D. & O. with the Administrative Review Board.

The Board affirmed the ALJ's R. D. & O.[3] Koch Foods appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit disagreed with the Board's conclusion that 49 U.S.C.A. § 31105(a)(1)(B)(i) protects an employee's refusal to operate a motor vehicle where the employee reasonably believes at the time that operation of the vehicle would violate a pertinent safety law.[4] Rather, the court held that Section 31105(a)(1)(B)(i) covers "only those situations where the record shows that operation of a motor vehicle would result in the violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security."[5] Consequently, the court vacated the ARB's decision and remanded the case for further consideration consistent with the court's opinion.

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[1] 49 U.S.C.A. § 31105 (Thomson/West Supp. 2013).

[2] 29 C.F.R. Part 1978.

[3] *Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061 (ARB Sept. 30, 2011).

[4] *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476 (11th Cir. 2013).

[5] *Id.* at 486.

DISCUSSION

The Eleventh Circuit's opinion constituting the law of the case,[6] we necessarily remand this matter to the ALJ for a determination, including findings of fact, as to whether an actual violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security would have occurred had Bailey hauled the trailer in this case. As the ARB noted in its previous decision, the ALJ did not make a definitive finding on whether the trailer Bailey refused to haul was overweight when he refused to drive.[7] This finding is critical to a determination of whether an actual violation of a safety regulation would have occurred if Bailey had hauled the trailer.[8]

Additionally, as we noted in our previous decision, although the ALJ's R. D. & O. ultimately found Koch Foods liable under Section 31105(a)(1)(B)(i), the decision also discussed other possible grounds for finding a STAA whistleblower violation. The ALJ cited case law arising under Section 31105(a)(1)(A) pertaining to STAA-protected complaints, as well as case authority under Section 31105(a)(1)(B)(ii) involving the refusal to drive where the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. Bailey may have asserted STAA protection under both of these provisions. However, it is not clear from the R. D. & O. whether the ALJ focused on only Bailey's claim of protection under Section 31105(a)(1)(B)(i), rather than other STAA provisions, out of judicial efficiency or because the ALJ believed that the evidence presented did not support a claim of protection beyond that afforded under subsection (a)(1)(B)(i). Accordingly, to reach finality in this matter, the ALJ is directed upon remand to also clarify whether Bailey has asserted whistleblower protection under other provisions of 49 U.S.C.A. § 31105 and, if so, his ruling reached with regard to any such provisions.

If the ALJ finds on remand that Bailey established that he engaged in STAA-protected activity, the burden of proof standards applicable under STAA as amended in 2007 are to be applied in determining whether Bailey's protected activity was a contributing factor in the adverse employment action taken against him.[9] Pursuant to the 9/11 Commission Act of 2007,

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[6] We note that the Eleventh Circuit's opinion is at odds with the Second Circuit's opinion in *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195 (2d Cir. 1993) (upholding protection for employee who was mistaken about safety violation but noting that an actual violation generally is required), upon which we had relied, in part, in reaching our decision in this case.

[7] See *Bailey*, ARB No. 10-001, slip op. at 5.

[8] In the ARB's previous decision we noted that while Bailey's supervisor testified that the trailer was not overweight when Bailey refused to pull it, the actual weight ticket for the trailer – which the supervisor testified he had seen – was not a matter of record. *Bailey*, ARB No. 10-001, slip op. at 3; ALJ R. D. & O., slip op. at 8. Given the Eleventh Circuit's ruling, the weight ticket has increased significance that, in the presiding ALJ's discretion, may or may not require reopening of the evidentiary record and discovery.

Pub. L. No. 110-53, 121 Stat. 266 (Aug. 3, 2007), STAA was recodified at 49 U.S.C.A. § 31105, with the burdens of proof standard amended to incorporate the AIR 21 standards set forth at 49 U.S.C.A. § 42121(b) (Thomson/West 2007). See 49 U.S.C.A. § 31105(b)(1). As the ARB discussed in our recent decision in *Beatty v. Inman Trucking Mgmt.*,[10] in its adoption of the AIR 21 burden of proof standards Congress replaced the *McDonnell Douglas*[11] Title VII burden of proof standards and burden-shifting analytical framework applicable under STAA prior to the 2007 amendments

> with a new burden of proof framework 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. 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.[12]

CONCLUSION

Accordingly, consistent with the Eleventh Circuit's opinion, the ALJ's Recommended Decision and Order of September 29, 2009, is **VACATED**, and this case is **REMANDED** for further proceedings consistent with the court's opinion and this Order of Remand.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[9] The ARB noted in its prior decision that the ALJ had erroneously applied the pre-2007 amendment burden of proof standards, although considered "harmless error" in light of our ruling in that decision. *Bailey*, ARB No. 10-001, slip op. at n.2.

[10] ARB No. 13-039, ALJ No. 2008-STA-020, -021 (ARB May 13, 2014).

[11] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973).

[12] *Beatty,* ARB No. 13-039, slip op. at 8 (citations omitted).