

In the Matter of:

**KERMIT PATTENAUDE,
COMPLAINANT,**

v.

**TRI-AM TRANSPORT, LLC,
RESPONDENT.**

ARB CASE NO. 15-007

ALJ CASE NO. 2013-STA-037

DATE: January 12, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kermit Pattenaude, *pro se*, Commerce Township, Michigan

For the Respondents:

Chris Parfitt, Esq. and Matthew C. Herstein, Esq.; *Deneweth, Dugan & Parfitt, P.C.*; Troy, Michigan

**BEFORE: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*.
Judge Desai, concurring.**

DECISION AND ORDER OF REMAND

Complainant Kermit Pattenaude filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his employer, Respondent Tri-Am Transport Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2016), as amended, and its implementing regulations at 29 C.F.R. Part 1978 (2016), when it terminated his employment. A Department of Labor Administrative Law Judge (ALJ) found that Respondent established by clear and convincing evidence that it would have terminated Pattenaude's employment absent his

protected activity. Thus, the ALJ denied Pattenaude's whistleblower complaint.¹ Pattenaude filed a timely petition for review with the Administrative Review Board (ARB). Upon review, the ARB reverses the ALJ's determination that Tri-Am Transport carried its burden of establishing that it would have terminated Pattenaude's employment even if he had not engaged in protected activity, and remands the case for a determination of damages.

BACKGROUND²

Respondent Tri-Am Transport is a tanker-truck transportation business. At all times relevant to this action, it was under contract with Severstal North America (SNA), its sole customer, to deliver pulverized coal to Severstal's steel mill in Dearborn, Michigan. Tri-Am loaded and hauled the coal from a DTE Energy Company facility in Detroit.³ Tri-Am Transport drivers, like Complainant Pattenaude, ran a continuous route to and from the DTE facility and the Severstal mill. They loaded pulverized coal onto trucks at the DTE facility; drove the trucks to the mill, where the coal was unloaded; and then returned to DTE with an empty truck for another load.⁴ On a typical work day, Pattenaude would load and unload coal several times each day.⁵ He usually worked five 12-hour shifts and one 10-hour shift per week, for a total of 70 hours.⁶ It was very important that the coal be delivered in a timely fashion, both for Severstal (it would be forced to switch to natural gas, a much more costly fuel, if it ran out of coal) and for Respondent (it could lose its only customer if the steel mill ran short of coal).⁷

¹ *Pattenaude v. Tri-Am Transp., LLC*, ALJ No. 2013-STA-037 (Oct. 17, 2014)(D. & O.).

² The ALJ made very few, if any, express findings of fact. Consequently, the background statement is taken primarily from the ALJ's summary of the uncontroverted testimony in the D. & O., but also includes relevant evidence of record which the ALJ did not explicitly consider that is not in dispute. Because the cited evidence is not disputed, the Board is able to rely upon this evidence in reaching its ultimate conclusion reversing the ALJ's decision on the merits.

³ Decision and Order Dismissing Complaint (D. & O.) at 6. DTE Energy Co. is a nationwide diversified energy company involved in the development and management of energy-related businesses and services, including the marketing and supply of coal throughout the Great Lakes region. *See* www.dteenergy.com.

⁴ *Id.* at 2-3.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.* at 6.

Alleged Protected Activity Prior to July 4th

Pattenaude testified generally to a number of instances of alleged protected activity that occurred about a month prior to his suspension and employment termination.⁸ He stated that he and a co-worker had complained to Lawrence Bowers, a supervisor, about a lack of water near the loading area to wash off caustic chemicals.⁹ He testified that supervisors discouraged employees from recording mechanical problems with tankers or trailers in pre- or post-trip inspection logs and instead required drivers to record problems on dry erase boards.¹⁰ He testified that Bowers had requested several times that he work more than seventy hours within an eight-day period, but that he had refused.¹¹

Several weeks before Tri-Am terminated his employment, Pattenaude raised concerns with several company supervisors, including Darrick Wilson and Bowers, about the practice of “slipping seats” where supervisors would drive tankers loaded with pulverized coal notwithstanding that the supervisors were not licensed to drive commercial motor vehicles and lacked the endorsements required to transport hazardous materials.¹² Sometimes Pattenaude and other drivers would drive the same truck and tanker throughout the day, and load and unload the coal themselves (in addition to their driving).¹³ However, to expedite the delivery of coal to Severstal, when its coal supply was running low at the steel mill, Tri-Am supervisors would undertake the loading and unloading of the coal, with the drivers continuously driving by “slipping seats,” i.e., upon returning to the DTE facility from the steel mill with any empty tanker, transferring to a pre-loaded truck that they would then drive back to the steel mill.¹⁴ When “slipping seats,” a supervisor at Severstal would unload the coal from a truck while the driver returned to DTE in a previously unloaded truck, and at DTE the driver would “slip seats” into a previously loaded truck for the return to Severstal, while the truck he drove to DTE was re-loaded.¹⁵ During the “slipping seats” procedure at DTE, a supervisor, who did not have a hazardous materials license, would move the loaded truck out of the loading area

⁸ Hearing Transcript (Tr.) at 125.

⁹ D. & O. at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 3, 8, 10.

¹³ *Id.* at 3.

¹⁴ Tr. at 138, 194.

¹⁵ Tr. at 138.

to a waiting area so that the next driver arriving with an empty tanker could pick it up. A similar practice was followed at the Severstal mill.¹⁶

Pattenaude testified that he considered the practice of “slipping seats” to be unsafe, because it required him to drive trucks that he was less familiar with, persons without proper licenses (supervisors) would drive the trucks within the facility to position them to be picked up by a driver, and he could not be confident that the trucks he “slipped” into had been properly inspected.¹⁷

Disciplinary Action Taken Prior to July 4th

Between June 21 and June 29, 2012, Pattenaude received four disciplinary “write-ups.” He testified that prior to his repeated safety complaints (beginning several weeks before his termination) Tri-Am had never disciplined him.¹⁸ On June 21, 2012, Pattenaude was given a written “Driver Disciplinary Action” for being one hour and twenty minutes late to work, although Tri-Am took no disciplinary action. He signed the document.¹⁹ The next day, on June 22, 2012, he was written up for “dereliction of duty” for hauling only four loads to Severstal during a twelve hour shift, although again Tri-Am imposed no discipline.²⁰ He refused to sign this disciplinary action. He explained that the number of loads pulled in a day was largely out of a driver’s control and that sometimes he had pulled only one load, sometimes two or three or four in the past, and Tri-Am never wrote him up for it.²¹ On June 27, 2012, Pattenaude received a disciplinary write up for failing to wear safety glasses while hooking up his truck at the Severstal mill, again with no disciplinary action taken.²² He also refused to sign this action maintaining that his personal glasses *were* “safety glasses” and asserting that he had left his company-

¹⁶ *Id.*

¹⁷ D. & O. at 3. In defense of their driving of the trucks at the DTE and Severstal facilities, Wilson and Bowers testified that they relied on multiple sources including a consulting agency, the state troopers who inspected their facilities, and their client’s management for their belief that supervisors, without hazardous materials licenses, could lawfully operate trucks on private property. D. & O. at 8-10. Furthermore, Respondent was never fined for permitting its unlicensed supervisors to move the trucks on private property while slipping seats. *Id.* at 8.

¹⁸ Tr. at 49.

¹⁹ Tr. at 52; Respondent’s Exhibit (RE) D.

²⁰ RE E.

²¹ Tr. at 55.

²² RE F.

issued safety glasses in his truck after being required to slip seats.²³ Finally, on June 29th, he received a written “Driver Disciplinary Action” for being eleven minutes late to work, although again no disciplinary action was taken.²⁴ He refused to sign this document, explaining that since he had worked over twelve hours the day before, and did not want to exceed the regulatory limit on service hours, he came in late the following day.

July 4th Events

Pattenaude described the loading and unloading process. For loading at the DTE facility, he would connect the tanker to the coal chute and then flip a switch that began the process of loading the coal.²⁵ Once the coal began loading, the entire operation was automated and it would shut off automatically if anything went wrong.²⁶ He would wait for the tanker to load in a small room that overlooked the trailer.²⁷ The control room, which contained computers that automated the loading process and a manual override button, was two flights of stairs below the waiting room.²⁸ Drivers were instructed to wait in the waiting room two flights above the control room because otherwise some drivers forgot to unhook the uppermost spouts after the loading process was complete.²⁹ He testified however that coal dust obscured the glass door most of the time so drivers were unable to see the loading process.³⁰ Further, he contended that employees were not required to stay in the room and monitor the loading process but could walk out onto a catwalk.³¹ Although the waiting room had emergency override controls nearby,

²³ Tr. at 57-58, 120.

²⁴ RE G. In noting that no disciplinary action was being taken with each of the cited incidents, the “Drive Disciplinary Actions” contained the proviso that no disciplinary action was being taken “at this time” or “none as of yet”—thus effectively warning Pattenaude that disciplinary action could in the future be taken.

²⁵ D. & O. at 2.

²⁶ *Id.* at 2; Tr. at 64.

²⁷ D. & O. at 2.

²⁸ *Id.*

²⁹ Tr. at 65-67.

³⁰ D. & O. at 2.

³¹ *Id.*

Pattenaude testified that it was impossible to locate them due to the amount of coal dust created during the loading process.³²

After the tanker was loaded, Pattenaude would disconnect the tanker, perform a pre-trip safety inspection (including checking the tires' air pressures), and drive the tanker to the Severstal mill, where the coal was unloaded into a hopper.³³ During the unloading process, he would wait in a small control room with a computer that monitored the unloading.³⁴ When the coal was unloaded at Severstal, Pattenaude would return with the emptied tanker to DTE to repeat the process.³⁵ Pattenaude explained in some detail why the process of unloading the coal at Severstal was riskier and required closer monitoring than the process of loading the coal into the tanker at DTE. While unloading the coal at Severstal, the drivers monitored the process in a control room, whereas at DTE, drivers were not allowed in the control room.³⁶

On July 4, 2012, after being notified that Severstal's coal supply was running low at its steel mill, Respondent invoked the "slipping seats" procedure.³⁷ Tri-Am supervisor Wilson was dispatched to the DTE facility, and supervisor Bowers to the steel mill, to facilitate the loading and unloading of the coal. Upon his arrival to work at the steel mill that morning, Pattenaude was informed that the "slipping seats" process had been invoked. Accordingly, Pattenaude drove an empty truck to DTE where Wilson told him to drive a pre-loaded truck of coal back to the Severstal mill.³⁸ Upon performing the pre-trip inspection on the loaded truck, Pattenaude observed a tire with low air pressure.³⁹ He reported it to Wilson and when Wilson asked him what he wanted to do about it, Pattenaude stated that he would not drive the truck until the tire was changed.⁴⁰ Bowers soon arrived at the DTE facility, whereupon Pattenaude again refused to drive the truck unless the tire was changed. According to Pattenaude, Wilson and Bowers were "kind of

³² Tr. at 64, 110.

³³ D. & O. at 2.

³⁴ *Id.*

³⁵ *Id.* at 2-3.

³⁶ Tr. at 28-30.

³⁷ D. & O. at 3; Tr. at 73-74; RE J.

³⁸ D. & O. at 3.

³⁹ *Id.*

⁴⁰ *Id.* at 3-4.

upset” that he refused to drive the loaded truck to Severstal.⁴¹ While moving the loaded truck away from the loading area, Pattenaude observed a bolt in the tire that he had identified as having low air pressure.⁴² The truck was taken out of commission and Pattenaude was assigned a new truck that, upon its loading, he drove to the Severstal mill.

Wilson testified that maintaining air pressure in truck tires and replacing tires as needed was a routine aspect of Tri-Am’s business.⁴³ He stated that Respondent changed tires every day and a half.⁴⁴ Severstal was billed for the costs of replacing the tire plus a profit margin.⁴⁵ However, Wilson and Bowers confirmed that, prior to Pattenaude grounding the truck and tanker on July 4th, no truck-tanker loaded with pulverized coal had ever before been taken out of service due to a tire with low air pressure.⁴⁶

After the truck was grounded, Pattenaude drove a different loaded truck to Severstal and unloaded it.⁴⁷ He then returned to DTE for a new load of coal. After initiating the loading process, he went into the small waiting room at DTE and fell asleep in a chair while his truck was being loaded.⁴⁸ Wilson, who was monitoring the loading process, testified that he went looking for Pattenaude a short time later upon completion of the loading of Pattenaude’s truck and found Pattenaude asleep in the waiting room.⁴⁹ After Wilson woke him, Pattenaude unhooked the tanker and drove it to the Severstal mill. Pattenaude continued his shift the remainder of the day, and on July 5th returned to work where he continued driving until the end of his work shift.

⁴¹ D. & O. at 4.

⁴² *Id.*

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 8, 10.

⁴⁷ *Id.* at 4. It appears from the evidentiary record that because Bowers had gone to the DTE facility to address Pattenaude’s refusal to drive, Pattenaude unloaded the tanker at the steel mill without supervisory assistance.

⁴⁸ *Id.*

⁴⁹ Unresolved by the ALJ is an evidentiary dispute as to exactly when Wilson discovered Pattenaude asleep (although there is no dispute about Pattenaude having fallen asleep). Pattenaude testified that the loading of the truck had not completed at the time he was awoken. D. & O. at 4; Tr. at 87. Wilson testified that he discovered Pattenaude asleep after the loading process had completed. D. & O. at 7; Tr. at 143.

Wilson testified that on July 4th, after finding Pattenaude asleep, he called Bowers and then John Shepard, president of Tri-Am, to report the incident.⁵⁰ Wilson recommended that Pattenaude's employment be terminated, although when asked if the operation supplying Severstal could continue without Pattenaude, Wilson informed Shepard that it could not.⁵¹

As the result of a request by Severstal the afternoon of July 4th to meet, Respondent met with Severstal's production team on July 5th. At this meeting, Severstal's representatives advised Respondent that they had noticed "significant decrease" in Respondent's production, and that the situation would not be tolerated should it continue.⁵² Later that afternoon, when Pattenaude went to check out at the end of his workday at 4:00 p.m., Bowers provided Pattenaude with a "Driver Disciplinary Action" (incident report) informing him that he was being suspended indefinitely without pay for "sleeping while loading hazardous material."⁵³ By letter dated July 16, 2012, Shepard informed Pattenaude that his employment was terminated "effective immediately."⁵⁴

Prior to the incident on July 4th, Respondent provided Pattenaude with copies of federal regulations governing the transport of hazardous materials, specifically those found in the *Hazardous Material Compliance Pocketbook* (RE A), and in the *Federal Motor Carrier Safety Regulations Pocketbook* (RE B).⁵⁵ Pattenaude stated that he understood that the regulations require that drivers be "alert at all times" when transporting hazardous materials.⁵⁶ He acknowledged that sleeping while coal was being loaded into a tanker may have violated federal regulations, but he testified that sleeping on the job was "included within [the] job description" because "we did, yes [ignore federal regulations]" by sleeping at work.⁵⁷ He stated that he did not believe that sleeping

⁵⁰ D. & O. at 7.

⁵¹ *Id.*

⁵² RE J.

⁵³ RE H, J.

⁵⁴ RE K. Unresolved by the ALJ is the inconsistency in the termination letter's reason for the personnel action (i.e. "unacceptable work performance, including but not limited to the incident on July 4, 2012") and the testimony of both Wilson and Bowers that the only reason that Pattenaude's employment was terminated was because he had fallen asleep in violation of company policy and federal regulations. D. & O. at 7, 9.

⁵⁵ D. & O. at 5.

⁵⁶ *Id.*

⁵⁷ *Id.* at 5; Tr. at 114.

while the tanker was being loaded was dangerous if the driver only slept during the automated process because a problem is most likely to occur during the start up when the pressure is turned on.⁵⁸ Pattenaude also testified that a few weeks before Tri-Am terminated his employment, he encountered Bowers sleeping in his truck, which was parked near the control room at the Severstal mill. Bowers had been working all night to keep production up, as the steel mill was running low on coal and Tri-Am had involved the “slip seating” process. Pattenaude woke Bowers and told him to go to the control room to monitor the unloading of Pattenaude’s truck because Pattenaude had been instructed to drive another (empty) truck back to DTE. When Pattenaude returned to DTE, he informed Wilson that he had better get Bowers some coffee because he had been sleeping in his truck and should not have been that far from the control room.⁵⁹ Bowers admitted that he may well have slept in his pick-up truck on occasion, but not while loading or on duty. He denied that Pattenaude ever found him asleep in his truck.⁶⁰

Bowers testified that Respondent followed federal safety regulations and required its drivers to remain alert on the job.⁶¹ He stated that drivers were not allowed to sleep or doze during the loading or unloading process and that he had made it clear to the drivers that they must be in sight of the equipment to push the emergency stop.⁶² He described the repercussions for an employee found asleep at work: “They would be written up, suspended, an investigation started, and more than likely termination.”⁶³

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in STAA cases.⁶⁴

The Board reviews the ALJ’s legal conclusions de novo.⁶⁵ The Board reviews an ALJ’s factual determinations under the substantial evidence standard.⁶⁶ The Board and

⁵⁸ D. & O. at 5.

⁵⁹ Tr. at 99-102.

⁶⁰ D. & O. at 10.

⁶¹ *Id.* at 9.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 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.

federal courts have held that substantial evidence must be evidence that “a reasonable mind might accept as adequate to support a conclusion.”⁶⁷ Accordingly, the Board will affirm an ALJ’s supported findings of fact even if substantial evidence also supports a contrary view, which it could justifiably support. For the Board to conduct a meaningful review, the ALJ’s decision and order must “include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record.”⁶⁸ In the absence of such findings of fact and conclusions of law, remand may prove warranted unless appropriate resolution of the case is clear as a matter of law based on the evidentiary record before the Board.⁶⁹

DISCUSSION

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee’s compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.⁷⁰ Of particular relevance to this case, STAA’s whistleblower provisions protect an employee from retaliation for refusing to operate a vehicle because its operation would violate a regulation, standard, or order of the United States related to commercial motor

⁶⁵ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

⁶⁶ 29 C.F.R. § 1978.110(b).

⁶⁷ *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 13 (ARB Aug. 29, 2014)(citing *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951)(quoting *consolidated Edison Co., v. NLRB*, 305 U.S. 197, 229(1938)).

⁶⁸ 29 C.F.R. § 18.57(b). *See also* 5 U.S.C.A. § 557(c) (“All decisions . . . shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record”). As we have previously noted, it is difficult for the ARB as an appellate body to review decisions with few express findings of fact. We urge ALJs to include a section explicitly identifying material findings of fact that lay out their view of what happened, rather than simply repeating the testimony of witnesses.

⁶⁹ *Atkins v. Salvation Army*, ARB No. 00-047, ALJ No. 2000-STA-019 (ARB Feb. 18, 2001); *Childers v. Carolina Power & Light. Co.*, ARB No. 98-077, ALJ No. 1997-ERA-032, slip op at 15-16 (ARB Dec. 29, 2000). *Cf. Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (remand unnecessary when it is clear that agency would have reached the same result had it applied correct reasoning); *FEC v. Legi-Tech, Inc.* 75 F.3d 704 (D.C. Cir. 1996) (remand is an unnecessary formality where the outcome on remand is clear).

⁷⁰ 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

vehicle safety, or because the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's hazardous safety condition.⁷¹ To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he or she engaged in STAA-protected activity; that he or she was subjected to adverse employment action; and that his or her protected activity was a contributing factor in that adverse action.⁷² If a complainant proves by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same personnel action even in the absence of the protected activity.⁷³

Protected activity

Respondent did not dispute that Pattenaude's complaint about the low air pressure in a tire on his truck was protected activity, and the ALJ so found.⁷⁴ While it is thus undisputed that Pattenaude's safety complaint constituted protected activity under 49 U.S.C.A. § 31105(a)(1)(A)(i), nevertheless the ALJ focused too narrowly on the report of low tire pressure as being "the" protected activity. Instead, Pattenaude characterized his protected activity in his objection to the Secretary's Findings as refusing to drive an unsafe vehicle on July 4, 2012. Further in his pre-trial brief, he reiterated, "Specifically, on July 4, 2012, Pattenaude refused to operate a tractor/tanker filled with pulverized coal because one of the tanker tires was damaged and low on air."⁷⁵

STAA provides protection for employees who refuse to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C.A. § 31105(a)(1)(B)(i). Pattenaude alleged that he refused to drive his truck because operation of the truck would have violated 49 C.F.R. § 396.7 (2012) which provides that a "motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle."⁷⁶ It is undisputed that upon discovering a tire with low air pressure on the

⁷¹ *Id.*

⁷² *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).

⁷³ *Id.*

⁷⁴ D. & O. at 10.

⁷⁵ Complainant's Pre-Trial Brief at 1.

⁷⁶ See also 49 C.F.R. § 397.17 (2012) ("Tires. (a) A driver must examine each tire on a motor vehicle at the beginning of each trip and each time the vehicle is parked. (b) If, as the result of an examination pursuant to paragraph (a) of this section, or otherwise, a tire is found to be flat, leaking, or improperly inflated, the driver must cause the tire to be repaired,

loaded truck to which he had been assigned, Pattenaude not only complained about the condition of the tire, he refused to drive the truck unless and until the tire was changed. This resulted in the truck being immediately taken out of service (“grounded”), with Pattenaude shortly thereafter assigned to drive a different truck to the Severstal mill.⁷⁷ Pattenaude’s protected activity on July 4th was thus more than simply reporting a tire with low pressure.⁷⁸ The protected activity included a refusal to drive a truck whose continued operation would have violated regulations governing commercial motor vehicle safety.⁷⁹

replaced, or properly inflated before the vehicle is driven. However, the vehicle may be driven to the nearest safe place to perform the required repair, replacement, or inflation.”)

⁷⁷ Tr. at 141-142 (Wilson); Tr. at 80-83 (Pattenaude).

⁷⁸ See *Maverick Transp., LLC v. U.S. Dep’t of Labor, Administrative Review Board*, 739 F.3d 1149, 1156 (8th Cir. 2014) (refusal to drive truck based upon fluid leak in power steering box that violates federal safety regulation constituted protected activity). Despite the ALJ’s failure to explicitly analyze Pattenaude’s refusal to drive, we find it constitutes protected activity as a matter of law based on the evidentiary record before the Board. See *Joyner v. Georgia-Pacific Gypsum*, ARB No. 12-028, ALJ No. 2010-SWD-001, slip op. at 17 n.5 (ARB Apr. 25, 2014) (citing *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) (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 confident that the agency would reach the same result upon a reconsideration cleansed of errors”) (citation omitted)).

⁷⁹ As detailed *supra* at 3, Pattenaude also asserted that he engaged in several other instances of protected activity several weeks before he was suspended. He complained about lack of running water near the loading area to wash off caustic chemicals; he complained about pre-trip and post-trip inspections of trucks; he refused Bowers’s repeated requests to exceed the regulatory requirements on maximum hours of service; and he complained that the common practice of “slipping seats” was both unsafe and prohibited by law. Specifically with regard to this last complaint, Pattenaude testified that he notified Bowers and Wilson that they were violating federal safety regulations by driving the tankers loaded with pulverized coal with neither a commercial driver’s license (CDL) nor the necessary tanker and hazardous materials endorsements. Tr. at 62-63. The ALJ noted, in another context, interpretive guidance for the Federal Highway Administration that appears to allow the operation of commercial motor vehicle on private property by a person without a CDL. D. & O. at 14, n.2. However, a complainant need not prove an *actual* violation of law or regulation to establish protected activity, but only establish a reasonable belief that his or her safety concern was valid. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 10, n.3 (ARB Feb. 29, 2012); see also, *Passaic Valley Sewerage Comm’rs v. Dep’t of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993). Arguably some, if not all, of these activities constituted STAA-protected activity. However, in light of the Board’s

Contribution

The ALJ found that Pattenaude complained about the low air pressure in his truck's tire on July 4, 2012, was suspended the following day, and terminated on July 16, less than two weeks later. Based on the "very close temporal proximity between Mr. Pattenaude's complaint and the adverse employment actions at issue," the ALJ found that Pattenaude met his burden to show by a preponderance of evidence that his protected activity was a contributing factor in his suspension.⁸⁰ We affirm this finding since the close temporal proximity in this case is alone sufficient to establish the contributing factor element.⁸¹ Likewise, since Pattenaude's refusal to drive occurred at the same time as his complaint about the tire air pressure, the very close temporal proximity supports an inference that his refusal also contributed to his suspension and ultimate termination.⁸²

Clear and convincing evidence

The ALJ's determination that Respondent carried its burden of proving that it would have suspended and terminated Pattenaude's employment in the absence of any STAA-protected activity was based on the undisputed fact that Pattenaude was found sleeping during the loading of his truck, and the testimony of supervisors Wilson and Bowers who asserted that Pattenaude's sleeping on the job was in violation of company policy and federal regulations requiring the attendance at all times of the loading and hauling of hazardous waste by commercial motor vehicles. Cited by the supervisors was a Tri-Am company policy bulletin (Respondent's Exhibit C) advising drivers that "leaving your trailer unsupervised during the off-load and/or loading process is grounds for immediate termination." They testified that sleeping by a driver during the loading of his vehicle constituted leaving the trailer unsupervised in violation of Tri-Am policy and federal safety regulations set forth in two company handbooks distributed to Respondent's employees.⁸³ The ALJ agreed, concluding that "sleeping is equivalent to

resolution of this case based on Pattenaude's clearly protected activities on July 4th, resolution of whether any of these activities were also protected under STAA is unnecessary.

⁸⁰ D. & O. at 12.

⁸¹ See *Riess v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 5 (ARB Nov. 30, 2010). *Accord Lockheed Martin v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009).

⁸² Because the Board finds it unnecessary to address whether Pattenaude's complaint about "slipping seats" and his other safety-related complaints prior to July 4th constitute STAA-protected activity, we do not reach the question of whether any of those activities also contributed to the adverse actions taken against him.

⁸³ Wilson cited the following provision from the company's *Hazardous Material Compliance Pocketbook* (RE A):

‘leaving your trailer unsupervised,’ and is out of line with Respondent’s policies and the federal regulations.”⁸⁴ The ALJ rejected Pattenaude’s argument that Respondent applied its policy against sleeping on the job discriminatorily and that the explanation for his employment termination was mere pretext, discounting his assertion that the supervisors had themselves violated federal commercial motor vehicle regulations and company policy, including sleeping on the job. Finally, the ALJ cited the supervisors’ testimony that the issue of the deflated truck tire was a routine aspect of Respondent’s truck maintenance in rejecting any argument about the significance of Pattenaude’s action the morning of July 4th.⁸⁵

As previously noted, to avoid liability where a complainant establishes that his or her STAA-protected activity was a contributing factor in the unfavorable personnel action at issue, the respondent must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity. The respondent’s burden of proof under the “clear and convincing” standard is more rigorous than the “preponderance of the evidence” standard that, it has been noted, “is a tough standard, and not by accident.”⁸⁶ Because employees are at a “severe disadvantage in access to relevant evidence” compared with employers, it is appropriate that their respective burdens of proof reflect that disadvantage.⁸⁷ This rationale is cogently

There are attendance requirements for cargo tanks that are being loaded and unloaded with hazardous materials. Such a tank must be attended at all times during loading and unloading by qualified personnel. The person who is responsible for loading the cargo is also responsible for seeing that the vehicle is attended

Tr. at 133-34. Furthermore, Wilson testified, Respondent’s stated policy that leaving a trailer unsupervised was grounds for immediate termination was in keeping with Federal Motor Carrier Safety Regulation 49 C.F.R. § 397.5(a), which states: “[A] motor vehicle which contains a Division 1.1., 1.2, or 1.3 (explosive) material, must be attended at all times by its driver or a qualified representative of the motor carrier that operates it.” Tr. at 135; RE B.

⁸⁴ D. & O. at 12.

⁸⁵ *Id.*

⁸⁶ *Araujo v. NJ Transit Rail*, 708 F.3d 152, 159 (3d Cir. 2013); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

⁸⁷ *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 55 (ARB Sept. 30, 2016, re-issued Jan. 4, 2017).

explained in the legislative history of the Whistleblower Protection Act (WPA),⁸⁸ to which the ARB has repeatedly looked for interpretive guidance:⁸⁹

[T]his heightened burden of proof required of the agency [employer] recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.^[90]

Subject to this heightened burden of proof, the Surface Transportation Act requires that the employer establish that it “would have taken the same unfavorable personnel action in the absence of [the protected activity].”⁹¹ It is not enough to show that the employee’s conduct violated company policy or otherwise constituted a legitimate independent reason justifying the adverse personnel action, or that the respondent *could have* taken the personnel action in the absence of the protected

⁸⁸ The WPA contains affirmative defense language imposing the same heightened burden of proof on a respondent as that found in STAA, the relevant language of which reads:

Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency *demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.*

5 U.S.C.A. § 1221(e)(2) (emphasis added).

⁸⁹ See, e.g., *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Speegle v. Stone & Webster Constr.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013); *Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. 7, n.105 (ARB Sept. 30, 2003);

⁹⁰ 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20 to the WPA).

⁹¹ 49 U.S.C.A. § 42121(b) (incorporated into STAA pursuant to 49 U.S.C.A. § 31105(b)).

activity.⁹² Consistent with Federal Circuit case authority interpreting the WPA,⁹³ the ARB has explained that in determining whether a respondent has met its burden of proving that it would have taken the same unfavorable personnel action in the absence of protected activity, consideration is required of the combined effect of at least three elements applied flexibly on a case-by-case basis: (1) the independent significance of the non-protected activity cited by the respondent in justification of the personnel action; (2) the facts that would change in the absence of the complainant's protected activity; and (3) "the evidence that proves or disproves whether the employer would have taken the same adverse actions [in the absence of protected activity]."⁹⁴ Moreover, the respondent is "required to demonstrate through factors extrinsic to [complainant's] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations."⁹⁵

The ALJ's determination that Tri-Am met its statutory burden of proof does not withstand judicial scrutiny when evaluated against the foregoing standard and factors, beginning with the strength of Respondent's evidence in support of its reason for terminating Pattenaude's employment. As explained below, the substantial evidence of record does not support finding that Tri-Am's rebuttal evidence establishes by clear and convincing evidence that it would have terminated Pattenaude's employment had he not engaged in protected activity

⁹² See *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014).

⁹³ The Federal Circuit has invoked a three-part test for determining whether a respondent has met its burden under the WPA of proving, by clear and convincing evidence, that it would have taken the same personnel action in the absence of a complainant's whistleblowing: "[1] the strength of the agency's evidence in support of its personnel action; [2] the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and [3] any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). *Accord Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1370-1375 (Fed. Cir. 2012).

⁹⁴ *Speegle*, ARB No. 13-074, slip op. at 12. Similarly, the Federal Circuit has noted that its decision in *Carr* "does not impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three *Carr* factors to weigh them each individually in the agency's favor. The factors are merely appropriate and pertinent considerations for determining whether the agency carries its burden of proving by clear and convincing evidence that the same action would have been taken absent the whistleblowing." *Whitmore*, 680 F.3d at 1374.

⁹⁵ *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 13-14 (ARB Sept. 30, 2015).

First of all, the ALJ repeatedly credited the “corroborated” evidence of Tri-Am’s supervisors, Wilson and Bowers, over Pattenaude’s solitary evidence.⁹⁶ Although we generally accord special weight to an ALJ’s demeanor-based credibility determinations, the credibility findings below are not grounded in demeanor but rather based largely on the fact that the two employer witnesses corroborated each other’s testimony and Pattenaude’s testimony was uncorroborated.

There are many factors that factfinders consider when determining witness credibility including the relationship a witness has with party litigants, the witness’ motivations, inconsistencies in testimony, a witness’ self-serving testimony, and bias.⁹⁷ Just because the employer can produce two supervisors to testify similarly does not necessarily mean that the testimony is more credible than a complainant’s uncorroborated testimony. The ALJ below failed to recognize that employers have the evidentiary advantage—they can draft the documents supporting their actions; they employ the witnesses who participated in an adverse action; and they possess the records that could document whether similar adverse actions have been taken in other cases. For employees, on the other hand, supportive witness testimony is much harder to come by. Complainant-employees can of course subpoena employee witnesses, but those employees may be reluctant to testify against their employer or fear retaliation themselves.⁹⁸ Credibility findings based on corroborated supervisor testimony do not always amount to error. But the ALJ’s findings below are particularly suspect because he relied so heavily on the simplistic notion that the corroborated testimony of two supervisors is more indicative of truth than the uncorroborated evidence of the

⁹⁶ D. & O. at 12 (“I find credible Mr. Wilson and Mr. Bowers’s testimony that Mr. Pattenaude was terminated because he was found sleeping on the job.”); D. & O. at 13 (“Mr. Pattenaude’s testimony in this regard is uncorroborated, while the testimonies of Mr. Wilson and Mr. Bowers corroborate one another and are reinforced by Respondent’s exhibits.”); D. & O. at 13 (“The only evidence that other employees were found asleep, however, is Mr. Pattenaude’s uncorroborated testimony. Mr. Wilson and Mr. Bowers, on the other hand, corroborated one another when they testified that they had never been found asleep on-duty by Mr. Pattenaude. Furthermore, I find their testimony to be, on the whole, more credible than Mr. Pattenaude’s.”); D. & O. at 14 (“Mr. Bowers and Mr. Wilson testified credibly that they relied on multiple sources, including a consulting agency, the state troopers who inspected their facilities, and their client’s management, for the belief that supervisors could lawfully operate trucks on private property.”).

⁹⁷ See *Bobreski*, ARB No. 13-001, slip op. at 25.

⁹⁸ See *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-036, slip op. at 5 (Sec’y Feb. 26, 1996) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) (“[t]he danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage.”)).

complainant without addressing any other factors or evidence that might reflect on credibility.

Pattenaude admitted that he fell asleep while on duty and that this may have violated federal safety regulations that require drivers to be “alert at all times” while transporting hazardous materials.⁹⁹ It is also undisputed that Respondent had a policy stating that “leaving your trailer unsupervised during the off-load and/or loading process is grounds for immediate termination.”¹⁰⁰ This evidence is sufficient to prove that Respondent had a legitimate business reason to terminate Pattenaude. However, the additional material facts found by the ALJ to support its conclusion that Respondent carried its affirmative defense burden were based on dubious credibility findings as explained above. For this reason, along with reasons that follow, we find that Respondent’s rebuttal evidence is insufficient to clearly and convincingly prove that it would have made the same decision in the absence of protected activity.

As stated, the ALJ embraced the supervisors’ corroborated testimony that the reason Pattenaude was terminated was because he was found sleeping on the job.¹⁰¹ But even assuming there was no other reason for terminating Pattenaude’s employment, there nevertheless exists a serious question concerning the purported legal significance Respondent attaches to his sleeping. As previously mentioned, Respondent asserted in justification of its action that because of his having fallen asleep Pattenaude left his truck unsupervised and unattended during the loading process in violation of company policy and federal regulations. It is undisputed that Pattenaude fell asleep during the loading of his truck the morning of July 4th. The evidentiary record nevertheless does not clearly and convincingly support a finding that because of Pattenaude’s action his truck was, as a result, left unattended and unsupervised in violation of the cited company policy and federal regulations as Respondent argues.

⁹⁹ D. & O. at 5.

¹⁰⁰ *Id.* at 12.

¹⁰¹ *Id.* Wilson testified that Pattenaude’s sleeping was the sole reason he recommended his termination. Tr. at 147. However, the reason provided in the letter that Pattenaude received terminating his employment, signed by Tri-Am’s president, was not so narrowly focused, stating: “The termination is for unacceptable work performance, *including but not limited to* the incident on July 4, 2012 (sleeping while loading hazardous material) noted in the driver disciplinary action form [of] July 5.” (Emphasis added). The ambiguity that the termination letter creates with its unexplained representation that there were reasons for terminating Pattenaude’s employment in addition to his sleeping on the job fails to meet the heightened “clear and convincing” burden of proof standard, which the ARB has held requires of the respondent an unambiguous explanation for the adverse action in question that is “highly probable or reasonably certain.” *Speegle*, ARB No. 13-074, slip op. at 11.

Both supervisors testified that when Respondent undertakes the “slipping seats” operation, as it did on July 4th, they personally assume responsibility for the loading and unloading of the coal, and that they were authorized and qualified to do so.¹⁰² Moreover, even though Pattenaude testified that he initiated the loading process at the DTE site before he fell asleep,¹⁰³ Wilson testified that at the time of the loading of the coal the morning of July 4th, the “slipping seats” operation had been invoked and that he was supervising the DTE site.¹⁰⁴ As previously noted, Tri-Am’s *Hazardous Material Compliance Pocketbook*,¹⁰⁵ cited in justification of the termination of Pattenaude’s employment, requires that a “qualified person” attend a vehicle being loaded with hazardous materials and that “[t]he person who is responsible for loading the cargo is also responsible for seeing that the vehicle is attended.”¹⁰⁶ Section 397.5(a) of the Federal Motor Carrier Safety Regulations,¹⁰⁷ also cited by Respondent in justification of Pattenaude’s employment termination, requires that a vehicle hauling hazardous materials must be attended at all times by either its driver “or a qualified representative of the motor carrier that operates it.”¹⁰⁸ Thus, contrary to Respondent’s assertion, the evidentiary record is less than convincing that at the time Pattenaude’s truck was being loaded the morning of July 4th it was left unattended and unsupervised within the

¹⁰² Tr. at 138-139, 159, 194.

¹⁰³ *Id.* at 85.

¹⁰⁴ At the hearing before the ALJ, in response to the question, “[Y]ou were supervising that area, correct?”, Wilson responded, “Yes.” Tr. at 164. Elsewhere Wilson testified that on the morning of July 4th while in the truck at the DTE site that had been taken out of service because of Pattenaude’s tire complaint, “I’m monitoring the activity how the operation is handling.” Tr. at 143.

¹⁰⁵ RE A.

¹⁰⁶ The *Hazardous Material Compliance Pocketbook* further requires that the individual attending the truck during loading must be within 25 feet of the truck, with “an unobstructed view of the cargo tank and delivery hoses(s) to the maximum extent practicable.”

¹⁰⁷ RE B.

¹⁰⁸ A motor vehicle is considered “attended” within the meaning of the federal regulations “when the person in charge of the vehicle is on the vehicle, awake, and not in a sleeper berth, or is within 100 feet of the vehicle and has it within his/her unobstructed field of view.” 49 C.F.R. § 397.5(d)(1). A “qualified representative of a motor carrier” is defined by the regulations as “a person who: (i) Has been designated by the carrier to attend the vehicle; (ii) Is aware of the nature of the hazardous materials contained in the vehicle he/she attends; (iii) Has been instructed in the procedures he/she must follow in emergencies; and (iv) Is authorized to move the vehicle and has the means and ability to do so.” 49 C.F.R. § 397.5(d)(2).

meaning of the cited company policy and federal regulations Pattenaude is charged with having violated.

The ALJ did not explicitly address the question of whether Respondent's motive for its action was retaliatory. Granted, it appears that in addressing Respondent's response to Pattenaude's concern about the low tire pressure, the ALJ inferred a lack of retaliatory motive, finding credible Wilson's testimony that changing tires was simply a cost of doing business. However, by limiting his focus to Pattenaude's complaint about the tire pressure, the ALJ failed to address the far more pertinent question of whether Respondent's motivation for suspending and subsequently terminating Pattenaude may have been due to Pattenaude's refusal to drive. By considering the protected activity to be simply the reporting of an unsafe tire, rather than a refusal to drive, the ALJ failed to take into account the relevant fact that Pattenaude's refusal to drive removed a truck from service on a day when Respondent was understaffed and in significant danger of seriously angering its only customer if it could not timely deliver the coal on which its customer relied.

Circumstantial evidence of record suggests that Pattenaude's refusal to drive, which resulted in taking a truck out of service,¹⁰⁹ may well have motivated Respondent's decision to terminate his employment. Severstal was Respondent's only customer. If the coal was not delivered to Severstal on time, Respondent was in danger of losing its only customer. Respondent was worried enough about the possibility that it could not fulfill its obligation to deliver the coal that it repeatedly invoked the "slipping seats" procedure to expedite loading and delivery. And, on the same day and in the immediate aftermath of Pattenaude's loaded truck being grounded because of his refusal to drive, Severstal contacted Respondent to set up a meeting the following day where Severstal's production team informed Respondent that they had noticed a "significant decrease" in Respondent's production and warned that continued low production would not be tolerated. Immediately following that meeting, Pattenaude was informed that he was being suspended indefinitely without pay for having slept the day before during the loading of his truck.

Also significant is the fact that although Respondent claimed that it was highly safety conscious, professing a "zero tolerance" for sleeping during the loading/unloading process that would result in immediate employment termination, Respondent allowed Pattenaude to continue driving the rest of the day on July 4th and all day the next day. It was only after Respondent's meeting with Severstal on July 5th that disciplinary action was taken against Pattenaude. Prior to that meeting, Pattenaude was permitted to continue driving because Respondent was short of drivers and behind schedule in its deliveries to Severstal. If in fact, as Respondent contends, safety was so important to the company that it would have fired Pattenaude regardless of his protected activity, it had

¹⁰⁹ Supervisor Bowers testified that the removal of the truck from service was unprecedented. Tr. at 182-183.

both reason and opportunity to do so on July 4th. However, upon being advised of Pattenaude's sleeping on the job on the 4th, Respondent's president was more concerned with continued delivery to Severstal. When informed that delivery operations could not continue without Pattenaude, the decision was made not to fire him or take other disciplinary action but to allow him to continue driving.

Respondent's decision to allow Pattenaude to continue driving seriously undermines the evidence the ALJ relied upon in finding Respondent's avowed reason for firing Pattenaude to be convincing. By focusing only on Pattenaude's protected activity of complaining about his truck's low tire pressure, the ALJ failed to take into consideration the significance or relevance of Pattenaude's protected refusal to drive that, in turn, effectively removed his truck from service. Obviously there was at least one consideration that was more important to Respondent than Pattenaude's violation of safety regulations—continuing the delivery operation to its only customer.¹¹⁰

Additionally, the record evidence shows that several of Pattenaude's alleged safety complaints directly implicated either or both of his supervisors in unsafe conduct. For example, Pattenaude testified that he told both Wilson and Bowers that they should not be driving loaded tractors without the requisite licenses and endorsements. Pattenaude testified that he repeatedly refused Bowers's entreaties to violate hours of service regulations. Even had Pattenaude not implicated his supervisors in unsafe conduct personally, his repeated complaints about safety potentially reflected on them in their capacity as managers. Pattenaude's repeated complaints about the practice of slipping seats, his refusals to exceed regulatory hours of service, his insistence upon adequate pre- and post-trip inspections, even if not STAA-protected activity, all directly implicated Respondent in possible federal safety regulatory violations as well as Respondent's ability to meet Severstal's production demands. As the Federal Circuit noted in *Whitmore*, it is not unreasonable to suggest that Pattenaude's supervisors might have developed or at least been influenced by retaliatory motives to suspend and ultimately terminate Pattenaude's employment.¹¹¹

Finally, and again assuming that Pattenaude's falling asleep was a legitimate reason for terminating his employment, the question remains as to whether Respondent would take similar action against employees who are not whistleblowers but who are otherwise similarly situated, having committed the same or similar violations as that for

¹¹⁰ And, as Pattenaude points out, if Pattenaude's allegedly unsafe conduct was the real issue, why did Tri-Am allow a clearly fatigued driver to continue transporting hazardous materials in apparent violation of federal regulations? See 49 C.F.R. § 392.3 ("No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.").

¹¹¹ *Whitmore*, 680 F.3d at 1372.

which the complainant has been sanctioned.¹¹² As the court noted in *Whitmore*, while a respondent's failure to prove that it has taken similar action against similarly situated non-whistleblowers does not mean that the respondent cannot prevail on its statutory affirmative defense, "failure to do so may be at the [respondent's] peril."¹¹³ Given the importance of such evidence in proving non-disparate treatment, coupled with the fact that the respondent will typically have far greater access and control over such evidence than will a whistleblower, the absence of any evidence demonstrating non-disparate treatment of similarly situated employees "may well cause the [employer] to fail to prove its case overall."¹¹⁴ In this case, both supervisors testified that Tri-Am would terminate the employment of any employee found similarly sleeping on the job, with supervisor Bowers describing the repercussions for any employee found asleep at work: "they would be written up, suspended, an investigation started, and more than likely terminated."¹¹⁵ The supervisors' testimony is, however, less than convincing, for the simple reason that neither could recall a similar situation of an employee falling asleep on the job as had Pattenaude or of an employee being terminated for engaging in similar conduct.¹¹⁶

CONCLUSION

The substantial evidence of record does not support the ALJ's finding that Respondent proved by clear and convincing evidence that it would have terminated Pattenaude's employment had he not engaged in STAA-protected activity given the questionable bases for the ALJ's credibility findings, the conflicting evidence regarding whether or not Pattenaude's falling asleep left his truck unattended and unsupervised during the loading process the morning of July 4th within the meaning of company policy and federal regulations cited by Respondent in justification of its action, the circumstantial evidence suggesting a retaliatory motive for Respondent's termination of Pattenaude's employment, and the lack of evidence of similar personnel action having been taken by Respondent against similarly situated non-whistleblower employees. Accordingly, the Board holds in favor of Complainant, finding Respondent liable for having violated the whistleblower protection provisions of the Surface Transportation

¹¹² Here we agree with the Federal Circuit's admonishment in *Whitmore*: "[E]ven where the charges have been sustained that the agency's chosen penalty is deemed reasonable, the agency must still prove by clear and convincing evidence that it would have imposed the *exact same penalty* in the absence of the protected disclosures." 680 F.3d at 1374.

¹¹³ *Id.* at 1374.

¹¹⁴ *Id.*

¹¹⁵ Tr. at 173.

¹¹⁶ Tr. at 151, 178.

Assistance Act. The ALJ's Decision and Order dismissing Pattenaude's complaint is **REVERSED**, and this case is **REMANDED** to the ALJ for a determination and award of damages.¹¹⁷

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

Judge Desai, concurring:

I concur in the decision to remand this case; however, I would not limit the ALJ's authority on remand to the question of damages. I would instead remand for the ALJ to reconsider the merits first and only then, if necessary, the question of damages. On the merits, I would remand for the ALJ to reconsider both his conclusion that Pattenaude's protected activity was a contributing factor in his termination; and, if necessary, the ALJ's determination that Tri-Am would, in the absence of Pattenaude's protected activity, nonetheless have terminated his employment. I would remand in light of (1) the ALJ's mischaracterization of (or misunderstanding about) the nature of the protected activity; (2) apparent conflicts between the ALJ's finding on contributing-factor causation and his finding on Tri-Am's same-action defense; and (3) the fact that the ALJ appears not to have considered certain relevant evidence in making both determinations. In contrast to the majority, however, I would not resolve the merits of this case because it depends on factual disputes that are within the ALJ's province to decide.

1. Agreement with majority

First, I agree that the ALJ erred in his characterization of Pattenaude's protected activity and that this might have improperly affected how he viewed the whole case.¹¹⁸ The ALJ understood Pattenaude's protected activity to be simply a complaint about low tire pressure, but the evidence is undisputed that not only did Pattenaude complain about the low tire pressure but that he also refused to drive the truck because of it. Both the

¹¹⁷ In the alternative, the parties can stipulate to damages, notify the Board if they reach a stipulation on damages and ask the Board to incorporate their stipulation into our final order in this matter.

¹¹⁸ Majority at text accompanying notes 74 to 79.

complaint about the low tire pressure and the refusal to drive are protected activity under the Surface Transportation Assistance Act, and each raises distinct legal bases for a violation of the Act.¹¹⁹ The ALJ's misunderstanding about the core of Pattenaude's alleged protected activity clearly affected his thinking about the case and made him minimize the impact the refusal to drive might have had on the termination. In particular, the ALJ wrongly viewed the protected activity as not particularly significant: for example, he specifically stated that he found "probative Respondent's evidence that maintaining air pressure in truck tires and replacing tires as needed was a routine aspect of its business."¹²⁰ But if the protected activity is the refusal to drive, particularly where, as the majority rightly points out, there was undisputed evidence that Pattenaude's refusal to drive could have risked the wrath of Tri-Am's only customer, the whole framing of the case arguably looks quite different: the question of whether Tri-Am routinely dealt with air pressure problems in its trucks' tires would be of very little relevance.

Second, I agree that the ALJ erred by failing to consider certain evidence. The majority rightly points out that certain evidence that the ALJ failed to address might matter in making the legal determinations in this case: the one-day delay before suspending Pattenaude,¹²¹ the possibility that Pattenaude's complaints implicated Wilson and Bowers personally,¹²² and the lack of any evidence that Tri-Am had ever sanctioned

¹¹⁹ Compare 49 U.S.C. § 31105(a)(1)(A)(i) (2012) ("A person may not discharge an employee . . . because . . . the employee . . . has filed a complaint . . . related to a violation of a commercial motor vehicle safety or security regulation, standard, or order . . ."), *with id.* § 31105(a)(1)(B) (i), (ii) ("A person may not discharge an employee . . . because . . . the employee refuses to operate a vehicle because—(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition . . .").

¹²⁰ D. & O. at 12.

¹²¹ Majority at paragraph accompanying note 110. On the one hand, as the majority points out, the delay could be of particular relevance because it could have demonstrated how desperate Tri-Am was not to stop the flow of pulverized coal to Severstal. On the other hand, a reasonable factfinder might simply view the delay as prudence on Wilson's part. After all, the only reason Pattenaude was allegedly unsafe was that he was asleep while the truck was loading. Once Pattenaude was awake, Wilson might reasonably have believed that he was no longer unsafe for the time being and might have felt the need to consult with his superiors before sanctioning Pattenaude, rather than suspending him on the spot. Indeed, suspending him immediately—and certainly firing him immediately—might well have raised *more* suspicions rather than, as the majority implies, fewer.

¹²² Majority at paragraph accompanying note 111. The ALJ did address this issue in some detail. In particular, the ALJ rejected Pattenaude's testimony that Pattenaude had found Bowers, Wilson or any other employees asleep. *See* D. & O. at 13. But the majority rightly notes that Pattenaude testified about other ways in which he implicated Wilson and Bowers in alleged wrongdoing, testimony that arguably gave a fuller context for why

anyone else for sleeping on the job.¹²³ To be sure, much of the evidence supporting some of these points consisted solely of Pattenaude's own testimony, and the ALJ was entitled to disbelieve that evidence or view that evidence as ultimately immaterial,¹²⁴ but the ALJ must consider and address the relevant evidence when making factual determinations. Thus, together with the ALJ's mistake about the protected activity, his failure to consider and address several pieces of relevant evidence precludes an affirmance.

2. Disagreement with majority

For two reasons, however, I disagree with the majority's conclusion that we, as an appellate body, can decide the merits of this case in Pattenaude's favor: (1) the majority errs by affirming the ALJ's finding on contributing-factor causation, given the clear conflict between that finding and the ALJ's finding on Tri-Am's same-action defense; and (2) the majority errs in concluding that the ALJ was not entitled to make the credibility determinations he made.

A. The ALJ's contributing-factor determination appears to have been based on a misunderstanding of the law.

The majority errs by failing to address the obvious conflict between the ALJ's conclusion that Pattenaude's protected activity was a contributing factor in his termination, a determination the ALJ apparently made based solely on temporal proximity, and the ALJ's conclusion that Pattenaude "was terminated because he was found sleeping on the job."¹²⁵ The ALJ thus failed to consider all the evidence not only, as the majority rightly points out, when determining whether Tri-Am met its burden to show its same-action defense but also, in the first instance, when determining whether Pattenaude had met his burden to show that his protected activity was a contributing factor in the termination.

Pattenaude believed Bowers and Wilson were out to get him. Of course, the ALJ was entitled not to believe any of that testimony, but he should have addressed what seems to be the core of Pattenaude's evidence that Wilson and Bowers had a real motive to punish him.

¹²³ Majority at text accompanying notes 112 to 116. The majority rightly explains that evidence of how other similarly situated employees who were not whistleblowers is extremely important for an employer to prove its same-action defense. It is not always necessary, however, and this might well be one of those cases: here, the ALJ might reasonably have believed that Pattenaude was simply the first person to have been caught sleeping after the June 13, 2012 intra-company bulletin. *See infra* text between notes 157 and 159.

¹²⁴ *See infra* Section 2.B

¹²⁵ D. & O. at 12.

Rather than affirming the ALJ's conclusion on the contributing-factor question, as the majority does, we should reverse and remand on that question. The ALJ may well have mistakenly believed that temporal proximity alone *required* a finding of causation.¹²⁶ If he did, then that would have been clear error.¹²⁷ Tri-Am's theory of the case seems to have been based on its claim that "[t]he decision to fire Mr. Pattenaude *had nothing to do with* any allegedly protected activity."¹²⁸ If the ALJ believed that, then the ALJ should have found in Tri-Am's favor on the question of whether Pattenaude's protected activity contributed to the termination, even with the temporal proximity.

On the one hand, the ALJ concluded that, "based on the temporal proximity, . . . Mr. Pattenaude met his burden to show . . . that his protected activity was a contributing factor in his suspension and termination."¹²⁹ Yet, at the same time, literally two sentences later (albeit in the next section of his opinion), the ALJ concluded that "Mr. Pattenaude was terminated *because* he was found sleeping on the job."¹³⁰

In affirming the ALJ's conclusion on contributing-factor causation,¹³¹ the majority simply sweeps this conflict under the rug by noting that "the close temporal proximity in this case is alone sufficient to establish the contributing factor element."¹³² But just because the temporal proximity is "sufficient" to establish contributing-factor causation doesn't mean that, in this case, temporal proximity did in fact establish contributing-factor causation in the mind of the factfinder. The factfinder has to determine whether the protected activity actually contributed in some way to the termination and can use the "close temporal proximity" as evidence in making that determination. From "close temporal proximity," the factfinder may infer a causal connection between the protected activity and the adverse action. But the factfinder also has to consider all the other relevant evidence.¹³³ Temporal proximity, in other words,

¹²⁶ See D. & O. at 11-12.

¹²⁷ See *Palmer* at text accompanying notes 227 to 230.

¹²⁸ Resp. Br. at 5 (emphasis added).

¹²⁹ D. & O. at 12.

¹³⁰ *Id.* (emphasis added).

¹³¹ See Majority text accompanying notes 80 to 82.

¹³² Majority at text accompanying note 81.

¹³³ See *Palmer* at text following note 215 (noting that "[f]or the ALJ to rule for the employee [on the contributing-factor question], the ALJ must be persuaded, based on a review of *all the relevant, admissible evidence*, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action" (emphasis added)).

can be enough, but if it is, the ALJ must state explicitly that it *is* enough *on the facts of the specific case*. Thus, while I agree that the ALJ would be permitted to find for Pattenaude based solely on temporal proximity, the ALJ had to explain why, not simply recite an incantation that “temporal proximity. . . is indirect evidence of a causal connection.”¹³⁴ In particular, he had to explain why he believed that Pattenaude’s protected activity was a contributing factor in his termination notwithstanding all the other evidence Tri-Am introduced to show that Pattenaude’s protected activity had, in Tri-Am’s words, “nothing to do with” the termination.¹³⁵

Pattenaude’s claim—that he was fired because of his safety complaints and refusal to drive—and Tri-Am’s theory of the case—that he was fired for sleeping while his truck was being loaded with hazardous materials—are of course not inherently contradictory. It could be that both the protected activity and Pattenaude’s sleeping on the job played a role. If so, the ALJ would need to find for Pattenaude on the contributing-factor causation question; but if that is what the ALJ believed, then the ALJ needs to say so. On the other hand, if the ALJ believed Wilson, who testified that the “*only reason* that Pattenaude was terminated was [that] he had fallen asleep on the job in violation of company policy and the federal regulations,”¹³⁶ then the ALJ almost certainly had to find against Pattenaude on the contributing-factor question, notwithstanding the close temporal proximity.

And, despite not explicitly stating that Pattenaude’s falling asleep on the job was the only reason Tri-Am terminated him, there are indications that that is exactly what the ALJ believed. First and foremost, the ALJ said he found Wilson and Bowers to be credible on the specific question of why Pattenaude was fired. The ALJ explicitly “[found] credible Mr. Wilson and Mr. Bowers’s testimony that Mr. Pattenaude was terminated because he was found sleeping on the job.”¹³⁷ Relatedly, further supporting the view that the ALJ really believed that Pattenaude’s sleeping on the job was the only reason for his termination were the ALJ’s general credibility determinations. For example, the ALJ “reject[ed] Mr. Pattenaude’s claim that other employees were found asleep on the job,” and he specifically found Wilson and Bowers’s testimony “to be, on the whole, more credible than Mr. Pattenaude’s.”¹³⁸

¹³⁴ D. & O. at 12.

¹³⁵ Tri-Am Br. at 5.

¹³⁶ D. & O. at 7 (emphasis added).

¹³⁷ *Id.* at 12.

¹³⁸ *Id.* at 13.

Second, the fact that Shepard, the ultimate decisionmaker, did not even know that Pattenaude had engaged in any protected activity¹³⁹ further supports what appears to be the ALJ's finding that Pattenaude was fired solely for sleeping on the job. By itself, Shepard's lack of knowledge should by no means be dispositive, since Wilson was certainly part of the relevant chain of causation when he recommended to Shepard that Pattenaude be dismissed. But Shepard's lack of knowledge is relevant to the question of the role temporal proximity might have played in this case, and it is highly relevant to the question of what Tri-Am would have otherwise done in the absence of the protected activity: it supports Tri-Am's claim that *Shepard*, the decisionmaker, might well have fired *anyone* who had slept on the job.

When the majority cites cases for the proposition that “close temporal proximity . . . is alone sufficient to establish the contributing factor element” those cases involve temporal proximity *plus decisionmaker knowledge*.¹⁴⁰ Thus, although courts and this Board have often said that temporal proximity can suffice, that is because decisionmaker knowledge has almost always been assumed.¹⁴¹ And where a court has explicitly held that temporal proximity can suffice when the actual decisionmaker lacked knowledge of the protected activity, it has been on the basis of the so-called “cat’s paw” theory of liability. In such circumstances, the courts have explicitly found that the decisionmaker was “poisoned” by a person who had both knowledge of the protected activity and motive to retaliate.¹⁴² Here, Wilson might well have “poisoned” Shepard, but the ALJ made no finding on that point, and it would be necessary before one could make a factual finding that Pattenaude’s protected activity was a contributing factor in *Shepard*’s decision to terminate Pattenaude. Moreover, the ALJ seemed to reject the principal evidence supporting the view that Wilson and Bowers had a motive to retaliate—namely, Pattenaude’s testimony.

¹³⁹ And here, by “protected activity,” I include all the other potential protected activity described in the fact section and at footnote 79 of the majority opinion.

¹⁴⁰ See Majority at footnote 81 (citing *Riess v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 5 (ARB Nov. 30, 2010); *Lockheed Martin v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); and *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009)).

¹⁴¹ Indeed, at times, courts and this Board have gone even further, making knowledge of the protected activity a separate element in the case, see *Van Asdale*, 577 F.3d at 1002-03; see also *Riess*, slip op. at 4 (noting that “Riess must prove by a preponderance of the evidence that . . . (2) Nucor was aware of the protected activity”)—in my view, wrongly, see *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2 n.2 (ARB Feb. 18, 2016).

¹⁴² See, e.g., *Lockheed*, 717 F.3d at 1137-38.

Third, the ALJ seemed convinced that Tri-Am did in fact have a “zero-tolerance policy for sleeping on the job,” at least as of starting on June 13, 2012.¹⁴³ The evidence supporting that policy consisted of *documentary* evidence; namely, the June 13, 2012 intra-company bulletin stating that “leaving your trailer unsupervised during the off-load and/or loading process is grounds for immediate termination,”¹⁴⁴ a bulletin that Pattenaude signed and agreed to. Importantly, this zero-tolerance policy was designed for *safety*, the very purpose of the relevant provisions of the Surface Transportation Assistance Act, the statute under which Pattenaude brings this case. Moreover, Tri-Am’s “zero-tolerance policy for sleeping on the job” was allegedly based on a federal safety regulation.¹⁴⁵

These were all facts the ALJ took into account when assessing Tri-Am’s same-action defense—i.e., when determining whether Tri-Am would have terminated Pattenaude in the absence of his protected activity—but they are also highly relevant facts for determining whether Pattenaude met his burden to show that his protected activity was a contributing factor in his termination, especially in a case such as this, where Tri-Am argues that the protected activity “had nothing to do with” the suspension or termination. The ALJ thus erred in finding for Pattenaude on the question of contributing-factor causation without addressing that evidence.

B. *The ALJ was entitled to make the credibility determinations he made.*

My second disagreement with the majority is with its decision to reject the ALJ’s credibility determinations. The ALJ found “credible . . . Mr. Wilson and Mr. Bowers’s testimony that Mr. Pattenaude was terminated because he was found sleeping on the job.”¹⁴⁶ The majority concludes that this was error because the ALJ “relied . . . heavily on the simplistic notion that the corroborated testimony of two supervisors is more indicative of truth than the uncorroborated evidence of the complainant without addressing any other factors or evidence that might reflect on credibility.”¹⁴⁷

But the ALJ did not in fact “rel[y] . . . heavily” on any such notion, and, in any event, it would not have been error for him to have done so.

First, the ALJ did not find Wilson and Bowers more credible than Pattenaude *solely* because Wilson and Bowers corroborated each other and Pattenaude lacked corroboration. On the key question, whether Pattenaude was fired because he was

¹⁴³ D. & O. at 12.

¹⁴⁴ D. & O. at 12.

¹⁴⁵ *Id.* at 12 (citing 49 C.F.R. § 397.5).

¹⁴⁶ *Id.*

¹⁴⁷ Majority at text following footnote 98.

sleeping on the job, the ALJ did not rely on the fact that Wilson and Bowers corroborated each other or that Pattenaude lacked corroboration. Rather, the ALJ said that Wilson and Bowers’s testimony was “corroborated *by ample evidence demonstrating Respondent’s zero-tolerance policy for sleeping on the job*” and, in particular, the June 13, 2012 intra-company bulletin.¹⁴⁸ Thus, the corroboration was based on *documentary* evidence, not the mere fact that the two supervisors were consistent with each other.

Second, the ALJ only refers to the corroboration of Wilson and Bowers as being relevant in two circumstances: (1) the witnesses’ relative knowledge of Tri-Am’s safety procedures, and (2) the question of whether anyone other than Pattenaude had been found asleep on duty. It is thus hyperbole to say, as the majority puts it, that the ALJ “relied . . . *heavily* on the simplistic notion that the corroborated testimony of two supervisors is more indicative of truth than the uncorroborated evidence of the complainant.”¹⁴⁹ The ALJ did mention the corroborated nature of Wilson and Bowers’s testimony and the uncorroborated nature of Pattenaude’s, but he did so for resolving conflicting testimony related to only those two facts.

Moreover, in one of the two references to witness corroboration, the ALJ specifically embedded the issue of corroboration into other rationales for why he believed Wilson and Bowers rather than Pattenaude. The ALJ wrote, “Mr. Pattenaude was a driver, not a supervisor, and although he performed pre- and post-haul safety inspections, *his knowledge of Respondent’s maintenance and safety practices would necessarily be more limited than that of his supervisors.*”¹⁵⁰ Only then does the ALJ state, “*Furthermore, Mr. Pattenaude’s testimony in this regard is uncorroborated while the testimonies of Mr. Wilson and Mr. Bowers corroborate one another and are reinforced by Respondent’s exhibits.*”¹⁵¹ Thus, even for one of the ALJ’s two references to witness corroboration, he had reasons other than the “simplistic notion” of witness corroboration to support his credibility determination—namely, both his belief that the supervisors were more likely to be knowledgeable about the particular fact (safety policies) and Tri-Am’s *exhibits*. It is thus a distortion of the ALJ’s opinion to say that he relied on the “simplistic notion [of corroboration] *without addressing any other factors or evidence that might reflect on credibility.*”¹⁵² He specifically “address[ed] . . . other factors [and] evidence that might reflect on credibility.”

¹⁴⁸ D. & O. at 12.

¹⁴⁹ Majority at text following note 98 (emphasis added).

¹⁵⁰ D. & O. at 13 (emphasis added). Pattenaude does contest the ALJ’s rationale that he was less knowledgeable than his supervisors, *see* Petition for Review at 1 para. 3, and Pattenaude may well be correct. But, again, this is a factual dispute properly resolved by the ALJ as the factfinder.

¹⁵¹ D. & O. at 13 (emphases added).

¹⁵² Majority at text following note 98 (emphasis added).

Furthermore, neither fact was crucial to the ALJ's ultimate factual determination. While the majority criticizes the ALJ for "heavily" relying on corroboration, it makes no allusion to either of these two factual disputes. The reason is that those two facts simply aren't crucial to the critical factual dispute raised in this case, which is in the first instance why Tri-Am discharged Pattenaude. The first fact—which simply supported the ALJ's determination that maintaining air pressure in truck tires and replacing tires as needed was a routine aspect of its business—is likely of little relevance given the ALJ's mischaracterization of the protected activity.¹⁵³ And, while the second—did anyone else sleep on the job?—is certainly more important, it was a factual dispute that the ALJ could simply have decided one way or the other based on his sense of the witnesses' demeanor in the context of the entire record.¹⁵⁴

Third, the ALJ is permitted to decide that corroboration supports his credibility determination. Perhaps even without the "simplistic notion" of corroboration, the ALJ still would have believed Wilson and Bowers, but not Pattenaude. Perhaps the ALJ didn't believe Pattenaude because Pattenaude seemed shifty on the stand. Perhaps it was that, in the end, the ALJ is forced to choose between what are in effect two conflicting stories, and he found "[Wilson and Bowers's] testimony to be, on the whole, more credible than Mr. Pattenaude's" because they looked to him to be more honest. That is enough to support a credibility determination.

Finally, even if the ALJ had erred in relying too heavily on the fact that Tri-Am's witnesses corroborated each other, we should remand, rather than make the credibility determination ourselves. The crux of my disagreement with the majority, then, involves the role of this Board in making factual determinations. We are supposed to review ALJs' factual determinations for substantial evidence and affirm them "even if substantial evidence also supports a contrary view."¹⁵⁵ Rather than decide the factual disputes—which are based on conflicts in live testimony—I would remand this case to the ALJ to do what only the ALJ, who watched all the witnesses and observed their

¹⁵³ See *supra* at text accompanying notes 118 to 120.

¹⁵⁴ Even if the majority viewed a reliance on corroboration in resolving that factual dispute as a mistake, then we should remand this case to the ALJ, the *factfinder* here, rather than arrogate to this Board the factfinding role. See *infra* text accompanying notes 155 to 159.

¹⁵⁵ Majority at text following note 67; see also *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)) (noting that this Board should uphold an ALJ's factual finding "even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo.").

demeanor, can do: resolve a conflict in the evidence—and in particular, the testimonial evidence.¹⁵⁶

The majority certainly does lay out an extremely plausible story for what happened here: (1) Pattenaude was a thorn in the side of Wilson and Bowers, constantly complaining about safety lapses, lapses that implicated both Wilson and Bowers personally—indeed, at times, he even found *them* sleeping on the job; (2) the two of them were waiting for any excuse to punish Pattenaude; (3) when Pattenaude refused to drive the truck on July 4th, Wilson worried that Tri-Am would lose its only customer and so he was particularly angry that day; (4) when he then found Pattenaude sleeping, he used that as an excuse to try to get rid of Pattenaude by recommending to Shepard that Pattenaude be fired; and (5) Shepard simply followed Wilson’s recommendation and, in any event, he too may have been worried about losing Sevestal as a client. This is of course a story of pretext, since Pattenaude admits that he slept on the job and knew about—indeed, signed and agreed to—the June 13th intra-company bulletin announcing the zero-tolerance policy for sleeping “during the . . . loading process.”¹⁵⁷

From the standpoint of appellate review, though, the story has a huge problem: it is dependent on Pattenaude’s testimony, which the ALJ found, “on the whole,” not to be as credible as the testimony of Wilson and Bowers. It seems likely, then, that the ALJ simply didn’t believe aspects of Pattenaude’s story and instead believed, as he explicitly

¹⁵⁶ See *In the Matter of Interstate Rock Prods. Inc.*, ARB No. 15-025, ALJ No. 2013-DBA-10, slip op. at 9 (ARB Sept. 27, 2016) (“Generally, the Board will defer to an ALJ’s factual findings, especially in cases in which those findings are predicated upon the ALJ’s weighing and determining credibility of conflicting witness testimony [I]t must be remembered that the ALJ heard and observed the witnesses during the hearing. It is for the trial judge to make determinations of credibility, and an appeals body such as the . . . Board should be [loath] to reverse credibility findings unless clear error is shown.” (internal citations and quotation marks omitted)); *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 30 (ARB Sept. 12, 2011) (Brown, J., dissenting) (“As enticing as it may be for the majority to evaluate the adequacy of that circumstantial evidence and reach its own conclusion on whether Bechtel met his initial burden of proof, that determination requires findings of fact that are not within the ARB’s purview, but reserved to the ALJ to decide upon remand.”); *Johnson v. Wellpoint Cos.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 10 (ARB Feb. 25, 2013) (“An ALJ is afforded great deference in assessing credibility of witnesses.”); see also *Moreland v. Bradshaw*, 699 F.3d 908, 920 (6th Cir. 2012) (noting that an eyewitness’s credibility is “a determination that is *exclusively* the province of the trier of fact” (emphasis added)); *United States v. Caseslорente*, 220 F.3d 727, 736 (6th Cir. 2000) (noting that “[t]he credibility of witnesses is a matter for the trial court, and the court’s determinations must be given substantial deference”).

¹⁵⁷ Comp. Br. at 6 (“I had no reason to believe that I would have been fired from my job for sleeping while the tanker was being loaded, *regardless of company policy and the acknowledgement thereof*” (emphasis in original).).

said, that “Mr. Pattenaude was terminated because he was found sleeping on the job.”¹⁵⁸ Indeed, the ALJ may have thought that Wilson and, more importantly, Shepard believed that Tri-Am *had to* enforce its policy so soon after sending the intra-company bulletin to all its employees; with his decision to fire Pattenaude, Shepard may well have wanted to send a message to the rest of Tri-Am’s drivers that sleeping on the job was unacceptable. The ALJ may have believed that, with the June 13th intra-company bulletin, Tri-Am was, as a small company, just trying to get its safety policies up to snuff. In other words, Tri-Am’s decision to fire Pattenaude might simply have been its way of saying, “Drivers, listen, we sent you this new policy last month, and we really mean it.”

This, Tri-Am was certainly entitled to do: it was, after all, enforcing a policy of *no sleeping on the job while hazardous materials are being loaded onto a truck*. As the majority rightly implies, it might seem suspicious that Pattenaude was the first to be sanctioned under the policy, but it is only suspicious *if one believes the rest of Pattenaude’s testimony*. It’s not suspicious at all if Pattenaude, who was found sleeping on July 4th, just happened to be the first one to have violated the policy after it was implemented on June 13th, a mere three weeks earlier. But whether it is suspicious or not is the ALJ’s decision to make, not ours.

Key is that we simply do not know whether Pattenaude’s story is correct, and, as an appellate body, we should not be resolving the dispute. Indeed, we have no way of knowing based on the reading of a dry transcript, since the dispute involves the resolution of *direct conflicts in testimony* by witnesses at a hearing. Pattenaude’s story is not implausible—indeed, if an ALJ were to believe that story, Pattenaude’s testimony would be sufficient evidence for Pattenaude to prevail in this case—but we do a real disservice to the Department’s entire system of adjudication by usurping the ALJ’s role and resolving factual disputes of this kind. As the majority points out, perhaps the ALJ failed to consider the mismatch in access to evidence between employees and employers,¹⁵⁹ and he should have. But then we should remand so that the ALJ can consider the mismatch in access to evidence, rather than decide that the ALJ believed the wrong witnesses. Determining whom to believe is the paradigmatic decision on which to defer, and here, that is exactly what we should have done.

In sum, I agree that the ALJ’s Decision and Order should be reversed and this case should be remanded. I would, however, remand not just for a damages determination, but instead for the ALJ to decide (1) whether Pattenaude’s protected activity was a contributing factor in his suspension and eventual termination; (2) if

¹⁵⁸ D. & O. at 12.

¹⁵⁹ Majority at text accompanying note 87.

necessary, whether Tri-Am would, even in the absence of that protected activity, nonetheless have suspended and terminated him; and (3) only if then necessary, the damages to which Pattenaude might be entitled.

ANUJ C. DESAI
Administrative Appeals Judge