



**In the Matter of:**

**JOE TOCCI,**

**ARB CASE NO. 15-029**

**COMPLAINANT,**

**ALJ CASE NO. 2013-STA-071**

**v.**

**DATE: MAY 18 2017**

**MIKY TRANSPORT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota**

*For the Respondent:*

**Adam L. Barton, Esq.; Barnes & Thornburg LLP, Fort Wayne, Indiana**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Administrative Appeals Judge; and Tanya L. Goldman, Administrative Appeals Judge**

**DECISION AND ORDER OF REMAND**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended.<sup>1</sup> Respondent Miky Transport employed Complainant Joe Tocci from January 14, 2013, until it terminated his employment on February 27, 2013.<sup>2</sup> Tocci filed a complaint on February 28, 2013, with the Occupational Safety and

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<sup>1</sup> 49 U.S.C.A. § 31105(a) (Thomson/West Supp. 2016). STAA's implementing regulations are found at 29 C.F.R. Part 1978 (2016).

<sup>2</sup> The Administrative Law Judge's (ALJ) Decision and Order (D. & O.) initially erroneously stated that Tocci was hired in April 2009, see D. & O. at 1, but later indicated that Miky Transport hired Tocci on January 14, 2013, see D. & O. at 3, 7, which is consistent with the evidentiary record. See Hearing Transcript (Tr.) at 32-33, 72-73.

Health Administration (OSHA) alleging that Miky Transport retaliated against him in violation of the STAA's whistleblower protection provisions. OSHA denied Tocci's complaint, and Tocci filed a request for hearing with the Office of Administrative Law Judges (OALJ). The ALJ assigned to the case held a hearing and concluded that protected activity was not a contributing factor in the termination of Tocci's employment. On February 2, 2015, Tocci filed an appeal with the Administrative Review Board (ARB or Board) alleging that the ALJ erred. The Board vacates the ALJ's dismissal of Tocci's complaint and remands for reconsideration consistent with this Decision and Order of Remand.

### BACKGROUND<sup>3</sup>

Respondent Miky Transport Company is a motor carrier that hauls freight for shippers and brokers, and operates commercial vehicles on the highways crossing state lines, with a gross vehicle weight rating of 80,000 pounds. Sead Catic, owner and president of Miky Transport, hired Complainant Tocci, who was assigned to operate a 2007 Volvo semi-truck tractor. Prior to his employment with Miky Transport, Tocci had driven a range of commercial trucks on and off since the mid-1970s, but had not operated a 2007 Volvo. Tocci estimated that in his commercial driving career, he had driven about half a million miles.

While at Miky, Tocci reported several problems with his truck. He reported his concerns verbally as well as by written reports on 3x5 cards to Emir Rizvik, Miky's safety supervisor, and to John Gotten, a Miky mechanic, as well as to Catic. D. & O. at 20; Tr. at 90, 134. Shortly after beginning work, Tocci informed Gotten about a problem with the Volvo's fifth wheel and the coupling system. D. & O. at 7; Tr. at 76. On or about February 17, Tocci informed Gotten that the Volvo's headlights were not particularly effective on low beam in illuminating the road, although this was not a problem when operating the truck in situations having a lot of ambient light or street lights. D. & O. at 7-8; Tr. at 77-81. Gotten advised Tocci that Volvos "were all like that, the low beams did not work very well, and he did not know why." D. & O. at 8; Tr. at 81. Tocci also noted that there was a problem with the truck's electronic control module (ECM) that recorded the miles driven, resetting itself randomly and that there was a possible air leak on the driver's side suspension. D. & O. at 10-11; Tr. at 105-06.

On the evening of February 23, 2013, Tocci operated the Volvo on a dark highway and again experienced poor illumination. D. & O. at 8. After several hours of driving through the night on his return after delivering his load in Detroit, Tocci finally pulled over in Napoleon out of exhaustion from driving with the impaired headlight illumination, which he described as 'scary dangerous'. D. & O. at 8-9, 11. Tocci returned the Volvo to Miky's yard in Ft. Wayne on Sunday, February 24. The next day, Monday, Tocci returned to the office where he met with Gotten and, subsequently, Rizvik. He submitted his maintenance list on a 3x5 card, inquired about the fifth wheel, which Respondent informed him, had not yet arrived, complained about the ECM not working properly and about the suspension air leak, and reiterated his complaint

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<sup>3</sup> In the absence of clear findings of fact by the ALJ, the Background Summary is taken from the ALJ's recount of the hearing testimony, D. & O. pp 3-18, unless otherwise noted. This summary should not be construed as findings of fact.

about the Volvo's headlights. D. & O. at 9. Rizvik informed Tocci that he had discussed the truck's headlights with Miky's management, and that although the Volvo's headlights were new, bad low beams were a problem unique to the Volvo.

On Wednesday, February 27, 2013, Tocci called in to Miky Transport to get permission to take his truck to the Volvo dealership to address his truck's headlights. He spoke by phone with Catic, and testified that he not only discussed the headlights but also the truck's ECM problem and the suspension air leak. When Catic offered to take the truck for a DOT inspection, Tocci asserted that passing a DOT inspection would not address the headlight problem because DOT did not have the equipment to measure the luminosity of the headlights. According to Complainant, Catic became increasingly angry during this call, ultimately stating, "look, that's it, I've had enough, take your stuff off my truck, you're done," which Tocci understood to mean that he was fired. Tr. at 109.

Catic testified that while he was aware of Tocci's safety complaints, he did not fire Tocci because of his complaints. Instead, Catic testified, he fired Tocci because he wanted too many days off.<sup>4</sup> According to Catic, two weeks before Tocci was fired he almost terminated Tocci's employment when he requested days off, but that he did not do so then because Tocci withdrew his request. Catic testified that Tocci, who had been continuously on the road driving for seven days (February 17 to February 24), informed Catic on the 27th that he would be ready to return to work in six days. This, Catic testified, was why he fired Tocci; not because he complained about the headlights on his truck.<sup>5</sup> He could not afford to have Tocci's truck sitting for six or seven days unused.<sup>6</sup>

The day after Catic terminated his employment, Tocci filed a complaint with OSHA. Before OSHA, Catic provided additional explanation for firing Tocci in a letter dated April 10, 2013, addressed to a Mr. Tim Crouse with OSHA:

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<sup>4</sup> The ALJ noted that Tocci's logbook sheets show that he worked 29 of the 46 days he was employed by Respondent. D. & O. at 26.

<sup>5</sup> Catic gave conflicting testimony about whether the headlight problem was even discussed at the time. As the ALJ noted, Catic both testified that he did not remember if Tocci complained to him about the headlights on his truck on the day that he fired him (D. & O. at 4, citing Tr. at 47), and that Tocci did not even talk about the lights (D. & O. at 5, citing Tr. at 50). However, these assertions by Catic seemingly conflict with Catic's further testimony (also noted by the ALJ) that he told Tocci to take his truck for a DOT inspection, and that if DOT said the lights were okay, there was nothing he could do about it. See D. & O. at 4, citing Tr. at 48.

<sup>6</sup> Tocci pointed out that notwithstanding the time that he had taken off from driving during his employment, his average weekly earnings of \$635.50, which were based on the number of miles driven, would result in earnings of \$32,500 annually—which was consistent with those of Miky's top earners. D. & O. at 26. According to Catic, his drivers make anywhere from \$15,000 to \$35,000 a year based on a pay scale of approximately 38 cents a mile, which he testified was about what Tocci made. D. & O. at 4.

Mr. Joe Tocci performance as a driver is below average. His working hours are not ok for us (to many days off), His HOS (log book) is not up to date (missing lot of days). To many complaints about his job. Office employees and dispatchers just don't work whit him. To avoid any more complications whit Mr. Joe we had to let him go.

Before the ALJ, Catic provided further explanation for his action in a letter dated February 28, 2014, addressed to Tocci's attorney. After recounting Tocci's complaints about his truck's headlights, and Respondent's efforts to address them, Catic stated:

We really didn't know what Mr. Tocci really wants from us, to avoid further complications with and Mr. Tocci concerns for his safety and there is nothing that we can do to make him safer we decided to terminate his job with us.

Exhibit CX-3 (errors in original).<sup>7</sup>

Following OSHA's denial of Tocci's complaint, the ALJ assigned to the case held a hearing and concluded that Tocci engaged in protected activity when he complained about the headlights, but that the protected activity was not a contributing factor in Miky's decision to terminate his employment. The ALJ additionally concluded that even if the protected activity was a contributing factor, Respondent had demonstrated by clear and convincing evidence that it would have terminated Tocci's employment because he took too many days off even if he had not engaged in protected activity. Tocci appealed the ALJ's decision to the ARB.

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under STAA.<sup>8</sup> The ARB reviews questions of law presented on appeal *de novo*, and is bound by the ALJ's factual determinations if the findings of fact are supported by substantial evidence of record.<sup>9</sup>

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<sup>7</sup> The ALJ noted that Catic testified at hearing that this sentence reflected the reason he fired Tocci, see D. & O. at 4, although, as noted, Catic contradicted himself and provided alternative reasons for the termination of Tocci's employment.

<sup>8</sup> 29 C.F.R. § 1978.109(a); Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

<sup>9</sup> *Hood v. R&M Pro Transp.*, ARB No. 15-010, ALJ No. 2012-STA-036, slip op. at 4 (ARB Dec. 4, 2015); *Myers v. AMS/Breckenridge/Equity Grp. Leasing 1*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008 (ARB Aug. 3, 2012).

## DISCUSSION

As the Board has repeatedly emphasized, to conduct a meaningful review of an ALJ's decision rendered upon an evidentiary hearing, the decision must necessarily include findings of fact upon each material issue of fact presented on the record.<sup>10</sup> It is impossible for the Board, an appellate body, to fulfill its role to conduct a substantial evidence review of an ALJ's findings of fact<sup>11</sup> if, as here, the ALJ fails to make necessary findings with regard to all material issues of fact. Simply repeating the testimony of the witnesses does not suffice. For this reason alone, the ALJ's Decision and Order should be vacated, and the case remanded to the ALJ to make necessary findings of fact.<sup>12</sup> Nevertheless, notwithstanding the ALJ's failure to make fact findings, she has also made clear errors of law warranting remand; we address these legal errors based on the existing evidentiary record.

Under STAA's whistleblower protection provision an employer "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because the employee . . . has filed a complaint . . . related to a violation of a commercial motor vehicle safety or security regulation, standard, or order."<sup>13</sup>

To prevail on his STAA whistleblower complaint, Tocci must prove by a preponderance of the evidence that (1) his complaints to his employer were protected activities;<sup>14</sup> (2) his employer took an adverse personnel action against him;<sup>15</sup> and (3) his protected activity was a contributing factor in the adverse personnel action.<sup>16</sup> If Tocci proves by a preponderance of

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<sup>10</sup> See, e.g., *Pattenaude v. Tri-Am Transp.*, ARB No. 15-007, ALJ No. 2013-STA-037, slip op. at 10 (ARB Jan. 12, 2017); *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 7 (ARB June 24, 2011); *Riess v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 3 (ARB Nov. 30, 2010). See 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 . . .").

<sup>11</sup> See 29 C.F.R. § 1978.110(b) ("The ARB will review the factual determinations of the ALJ under the substantial evidence standard.").

<sup>12</sup> "Where a material issue is left unresolved, a remand is typically necessary." *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, slip op. at 7 (citing *Riess v. Nucor Corp.*, ARB No. 08-137, slip op. at 3).

<sup>13</sup> 49 U.S.C.A. § 31105(a)(1)(A)(i).

<sup>14</sup> Internal complaints to management are protected under STAA. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 slip op. at 7 (ARB Jan. 31, 2011).

<sup>15</sup> Employment termination constitutes an adverse action under the STAA. 29 C.F.R. § 1978.102(a).

<sup>16</sup> *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6.

evidence that his protected activity was a contributing factor in the adverse personnel action, Miky Transport may nevertheless avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event.<sup>17</sup> “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’”<sup>18</sup>

*A. Tocci’s STAA-protected activities*

Before the ALJ, Tocci alleged that his complaints about his truck’s headlights, concerning the safety of the truck’s “fifth wheel” coupling, about the ECM’s failure to accurately record mileage, and about an air leak in the truck’s suspension constituted STAA-protected activity. The only complaint the ALJ recognized as protected activity was Tocci’s complaint about the headlights. Based on Tocci’s description of the problems he had with his low-beam headlights, coupled with the acknowledgements of Respondent’s safety supervisor and Catic that the Volvo headlights did not operate well on low beam, the ALJ found that Tocci had a reasonable belief that the operation of his truck’s headlights presented a safety issue and thus that Tocci’s complaint about the headlights constituted STAA-protected activity.<sup>19</sup>

The basis for the ALJ’s rejection of Tocci’s other complaints is not at all clear. The only explanation provided is that contained in a footnote, in which the ALJ stated:

Neither of the parties addressed the reasonableness of Mr. Tocci’s belief that his complaints about the fifth wheel, the air suspension leak, or the ECM presented safety issues. Mr. Tocci and Mr. Millard discussed how these problems could potentially affect the safe operation of the truck, or result in regulatory violations. But Mr. Tocci does not argue, and there is no evidence to suggest, that his complaints about these issues were a contributing factor in Mr. Catic’s decision to fire him.<sup>[20]</sup>

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<sup>17</sup> 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. 1979.109(a); *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6-7 (ARB Feb. 29, 2012). STAA whistleblower complaints are governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson Reuters 2007), which contains whistleblower protections for employees in the aviation industry. *Warren*, ARB No. 10-092, slip op. at 6-7.

<sup>18</sup> *Warren*, ARB No. 10-092, slip op. at 6-7.

<sup>19</sup> *See* D. & O. at 23-24.

<sup>20</sup> *Id.* at 23, n.7.

It is difficult to know how to interpret this explanation.<sup>21</sup> Tocci and Mr. Millard (who testified as an expert on Tocci's behalf) both discussed (as the ALJ's footnote acknowledges) how the problems Tocci identified could potentially affect the safe operation of the truck or result in regulatory violations. Indeed, Millard explained at length the safety issues associated with the various concerns Tocci raised about his truck's defective headlights, ECM, "fifth wheel" coupling device, and suspension air leak.<sup>22</sup> However, Tocci was not required to prove that the truck's defects actually presented safety issues to establish that he engaged in STAA-protected activity, only that his complaints related to reasonably perceived violations of commercial vehicle safety regulations.<sup>23</sup>

Under 49 U.S.C.A. § 31105(a)(1)(A), Tocci was only required to have acted "on a reasonable belief regarding the existence of an actual or potential violation."<sup>24</sup> The reasonableness of a complainant's belief is assessed both subjectively and objectively, with the "subjective" component satisfied by showing that the complainant actually believed that the conduct he complained of constituted a violation of relevant law.<sup>25</sup> The "objective" component

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<sup>21</sup> What is clear is that the ALJ's concluding statement in the footnote, that "Mr. Tocci does not argue, and there is no evidence to suggest, that his complaints about these issues were a contributing factor in Mr. Catic's decision to fire him," makes no sense at all. The question of whether Tocci's other complaints were contributing factors in Respondent's decision to terminate his employment is irrelevant to the question of whether they constitute protected activity. In any event, the ALJ's assertion is not supported by the record. Tocci not only presented evidence that all of his complaints contributed to his discharge (see Tr. at 32-41, 73-76, 90-91, 94, 98, 101-103, 106), he argued in his Post-Hearing Brief before the ALJ that they were contributing factors. See Complainant's Post-Hearing Findings of Fact and Legal Argument (Aug. 12, 2014), p. 13 ("Mr. Tocci engaged in protected activities when he filed complaints reporting that truck no. 205 had an air leak in the suspension, a defective ECM, and defective headlights. These protected activities were contributing factors in Mr. Tocci's discharge.").

<sup>22</sup> See D. & O. at 16-17. This testimony was buttressed in part by that of Catic who, the ALJ noted, agreed that if there was a bad fifth wheel coupling on a truck it could cause a safety problem, see D. & O. at 3 (citing Tr. at 37), and testified that he had the fifth wheel on Tocci's truck repaired. Tr. at 38. Respondent's safety supervisor and Catic both acknowledged "that the Volvo headlights did not operate well on low beam." D. & O. at 24. Catic also testified that he was aware of the ECM issue and agreed that it needed to be checked out. Tr. at 41; cf. Tr. at 94.

<sup>23</sup> See *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, -159; ALJ No. 2005-STA-063, slip op. at 8-9 (ARB June 30, 2008).

<sup>24</sup> *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012); *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). See also *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (STAA protection not dependent upon whether complainant proves a safety violation).

<sup>25</sup> *Gilbert*, ARB No. 11-019, slip op. at 7; *Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 3 (ARB Sept. 30, 2011).

“is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”<sup>26</sup>

It is undisputed that Tocci subjectively believed that the several problems with his truck, of which he complained, constituted safety issues and violated commercial motor vehicle safety regulations.<sup>27</sup> The “objective” component of the reasonableness test appears to be met in this case as well. Tocci did not merely rely on his own opinion about the safety violations. At hearing, he presented Millard’s corroborating expert testimony, including a report prepared by Millard,<sup>28</sup> and extensively cited to the various commercial motor vehicle safety regulations potentially violated by each of the four vehicular problems about which he had complained.<sup>29</sup>

Based on a thorough review of the evidentiary record in this case, the conclusion is inescapable that Tocci engaged in STAA-protected activity in raising his concerns about the truck’s low-beam headlights.<sup>30</sup> We remand for a determination by the ALJ of whether Tocci’s concerns about the “fifth wheel” coupling, the ECM’s inaccurate mileage recording, and the suspension air leak also constituted STAA-protected activity.

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<sup>26</sup> *Gilbert*, ARB No. 11-019, slip op. at 7 (quoting *Harp v. Charter Comm’n*, 558 F.3d 722, 723 (7th Cir. 2009)). See also, *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011).

<sup>27</sup> See D. & O. at 23 (“Mr. Tocci clearly believed that . . . there were problems with his headlights, based on his experience the night of February 24, 2013, the comments from Mr. Rizvik and Mr. Catic, and his research on the internet.”), and D. & O. at 23, n.7 (“Mr. Tocci . . . discussed how [the other] problems could potentially affect the safe operation of the truck, or result in regulatory violations.”).

<sup>28</sup> See D. & O. at 16-17, and CX-8.

<sup>29</sup> At pages 14 through 19 of his Post-Hearing Brief, Tocci cited specific commercial motor vehicle safety regulations governing each of the four concerns that he had raised. Concerning the “fifth wheel” coupling, Tocci cited 49 C.F.R. §§ 392.7, 393.70 and 396.3(a)(1); concerning the ECM mileage recording problem, Tocci cited 49 C.F.R. § 395.8; regarding the suspension air leak, Tocci cited 49 C.F.R. §§ 393.207(f), 393.52, 396.7(a) and 396.2; and concerning the headlight problem, he cited 49 C.F.R. §§ 392.7, 393.9, 396.3(a)(1) and 392.2. These same regulations were cited in Tocci’s Opening Brief before the ARB, at pp. 9-10.

<sup>30</sup> In response to Respondent’s argument at pages 15-16 of its brief on appeal, we concur in the ALJ’s finding that Tocci’s headlight complaint was STAA-protected activity even though Tocci certified the Volvo as “all clear” on daily formal maintenance logs and acknowledged that the truck’s headlights would pass DOT inspection. In a DOT roadside inspection, inspectors check highlights for operation of the high and low beams but do not check for how well they illuminate. See D. & O. at 16, citing Tr. at 162 (“Mr. Millard [an expert witness who testified on behalf of Tocci] stated that in a roadside inspection, the headlights are checked primarily for operation, to make sure the high and low beams work. They are not checked to see how well they illuminate the road surface on a dark road at night.”).



B. “Contributing factor” causation

On appeal, Tocci argues that the ALJ erroneously applied the causation standard in existence before the STAA was amended in August of 2007. We agree. In reaching his conclusion that Tocci failed to prove that his protected activity was a contributing factor in his employment termination, the ALJ cited to and relied upon ARB case authority governing causation and the parties’ respective burdens of proof that pre-dated the 2007 amendments to STAA adopted as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (August 7, 2007). At page 19 of the D. & O. the ALJ cites *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-033 (ARB Oct. 31, 2003), and *Assistant Secretary v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-044 (ARB July 31, 2003), as requiring of the complainant proof of “a causal connection between the protected activity and the adverse employment action.” Consistent with earlier ARB precedent,<sup>31</sup> both decisions articulate the Title VII analytical framework and allocation of burdens of proof established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

However, as the Board pointed out in *Salata v. City Concrete, LLC*,<sup>32</sup> and has since reiterated in numerous decisions,<sup>33</sup> the 2007 legislation replaced the *McDonnell Douglas* Title VII burden of proof standards and burden-shifting analytical framework in STAA cases by incorporating the legal burdens of proof and framework imposed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (AIR 21) (Apr. 5, 2000). The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to expressly provide that STAA whistleblower complaints are to be governed by the legal burdens of proof set forth at 49 U.S.C.A. § 42121(b), which provides whistleblower protection for employees in the aviation industry. Under the AIR 21 standard, a new burden of proof framework was established in which the complainant is initially required to show by a preponderance of the evidence that protected activity was a “contributing factor” in the alleged adverse personnel action. Should the complainant meet the “contributing factor” burden of proof, the burden shifts to the employer, who is required 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.<sup>34</sup>

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<sup>31</sup> See, e.g., *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-015 (ARB Aug. 1, 2002).

<sup>32</sup> ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-012, -041 (ARB Sept. 15, 2011).

<sup>33</sup> See, e.g., *Blackie v. Pierce Transp.*, ARB No. 13-065, ALJ No. 2011-STA-055 (ARB June 17, 2014); *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, -021 (ARB May 13, 2014).

<sup>34</sup> 49 U.S.C.A. § 42121(b)(2)(B)(iii) and (iv); see also 75 Fed. Reg. 53,545; 53,550.

The D. & O. contains language that suggests that the ALJ applied the proper burden of proof standard notwithstanding his citation to the pre-2007 ARB case authority.<sup>35</sup> However, the ALJ's analysis clearly indicates that she erroneously imposed upon Tocci the pre-2007 proof requirements. See, e.g., D. & O. at 27 (finding that "Mr. Tocci's complaints about his headlights, or other safety issues, were not a causal factor in his termination"), and D. & O. at 28 (concluding that "Mr. Tocci has not established that any adverse action taken by Respondent was motivated by Mr. Tocci having engaged in alleged protected activity;" and that "Mr. Tocci has not established that Mr. Catic fired him because he complained about the headlights on his truck, or that his termination was motivated by any prohibited reasons") (emphasis added).

As the Board explained in *Beatty v Inman Trucking*,

the "contributing factor" standard was "intended to overrule existing case law, which required a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause. The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination." A "contributing factor," the ARB has repeatedly noted, is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision." Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity."<sup>36</sup>

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<sup>35</sup> See D. & O. at 24 ("Assuming that Mr. Tocci engaged in protected activity, it is his burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action."). See also D. & O. at 27 (finding that "Mr. Tocci's complaint about his headlights was not a factor that, alone or in combination with other factors, tended to affect in some way Mr. Catic's decision to fire him"); D. & O. at 28 ("In sum, Mr. Tocci has not demonstrated by a preponderance of the evidence that his protected activities contributed to any adverse action taken against him.").

<sup>36</sup> *Beatty*, ARB No. 13-039, at 8-9 (citing and quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006); *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008); *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18-19 (ARB May 31, 2006)).

Consequently, under an appropriate “contributing factor” analysis, the ALJ’s finding that “Mr. Catic had credible and legitimate reasons for firing Mr. Tocci unrelated to any of his complaints about safety,” D. & O. at 26, is irrelevant to the question of whether any of Tocci’s safety complaints contributed in any way to Catic’s decision to terminate his employment. Tocci correctly notes in his brief on appeal that the post-amendment STAA does not require that the plaintiff disprove each of the employer’s reasons to prevail. It would be entirely feasible for Tocci’s complaints to be a contributing factor *and* for Catic to have credible and legitimate reasons for terminating his employment.

In concluding that “[i]t was Mr. Tocci’s request for time off that was the catalyst for Mr. Catic’s firing of Mr. Tocci,” the ALJ at the same time noted that “Mr. Tocci’s complaints about his headlights may have angered Mr. Catic, and put him in a frame of mind where Mr. Tocci’s request for more time off was not well received.”<sup>37</sup> This, by itself, undermines the ALJ’s conclusion that “Mr. Tocci’s complaint about his headlights was not a factor that, alone or in combination with other factors, tended to affect in some way Mr. Catic’s decision to fire him.”<sup>38</sup> As the Board recently noted in *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Jan. 4, 2017), in determining whether the employee’s protected activity “play[ed] a role, any role, in the adverse action,” even an “insignificant” or “insubstantial” role suffices.<sup>39</sup>

In sum, the Board concludes that the ALJ failed to properly apply the “contributing factor” standard and therefore committed reversible error. This case will thus be remanded for a determination of whether any or all of the four protected activities in which Tocci engaged were contributing factors in Catic’s decision terminating his employment.<sup>40</sup> Of course, before liability can attach to Respondent’s conduct, should the ALJ find that any or all of his complaints were contributing factors, the ALJ must determine whether Respondent is nevertheless able to

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<sup>37</sup> D. & O. at 27.

<sup>38</sup> *Id.*

<sup>39</sup> *Palmer*, ARB No. 16-035, slip op. at 52-53. *Palmer* is the most recent pronouncement by the ARB, presiding *en banc*, addressing the burden of proof required of a complainant in establishing “contributing factor” causation.

<sup>40</sup> In remanding for consideration of all Tocci’s potential protected activities as possible contributing factors, the Board is mindful, as we noted at page 7, n.21 *supra*, of the ALJ’s assertion that Tocci did not argue “and there is no evidence to suggest” that Tocci’s complaints, other than that about his headlights, were a contributing factor in Catic’s decision to terminate his employment. This might give rise to an argument of waiver by Tocci on appeal of whether the other three protected activities were contributing factors but for the fact, as was pointed out at n.21, the ALJ’s assertion is not supported by the record. To reiterate what we stated previously, Tocci not only presented evidence that all four of his complaints contributed to his discharge, he argued in his Post-Hearing Brief before the ALJ that they were contributing factors, clearly asserting that “[t]hese protected activities were contributing factors in Mr. Tocci’s discharge.” *See Complainant’s Post-Hearing Findings of Fact and Legal Argument* at 13 (Aug. 12, 2014).

demonstrate by “clear and convincing evidence” that it would have taken the same adverse action in the absence of Tocci’s protected conduct.

*C. Additional discrepancies with respect to the ALJ’s “contributing factor” determination*

We also find that the ALJ improperly discounted certain evidence and failed to explain how she resolved conflicting evidence, making it difficult to evaluate whether substantial evidence supports her findings on contributing factor and Respondent’s affirmative defense.

On appeal, Tocci claims that Catic’s February 18, 2014 response to a discovery request<sup>41</sup> precludes the ARB from finding that substantial evidence supports the ALJ’s opinion. Tocci argues that Respondent admitted in the letter that it terminated Tocci because of his headlights complaints. The ALJ disagreed with Tocci’s conclusion that Respondent’s letter was “smoking gun” evidence that it retaliated against Tocci. The ALJ’s sole explanation for discounting this evidence was Catic’s *pro se* status and his poor English skills.<sup>42</sup> If these were the ALJ’s only reasons for discounting this evidence, this was improper. The absence of legal representation does not detract from the reliability of an employer’s statement about its reasons for taking an adverse action; if anything, it may make the evidence more, not less, reliable. It would be an extremely problematic precedent to suggest that an employer’s statements about his reasons for

<sup>41</sup> See CX-3 (grammar from original):

We gave him opportunity to have nice job But Mr. Tocci start to complain about his job. He didn’t like hours that he was working, he didn’t like the truck we gave him. He wanted many days off as soon as he started working for us, he was complaining about everything, for him we don’t know how to run our business we don’t know anything about truck, nothing about safety and so forth. On his letter he wrote about truck that he was driving Unit #205 his concern was low beam light. We wore explaining to Mr. Tocci that Volvo trucks have bad lights and everybody who drove Volvo trucks know that. On this unit# 205 new lights wore installed not even six months before Mr. Tocci start working. Our mechanic John Gatton was checking this lights out and didn’t find anything wrong, than Mr. Tocci asked our safety supervisor Emir to get out of office and check them out he want out and did’t find anything wrong with the lights. We know that Mr. Tocci is wearing glasses what makes him even harder to see but there was realy nothing we can do to make the lights better. We really didn’t know what Mr. Tocci really wants from us, to avoid further complications with and Mr. Tocci’s concerns for his safety and there’s nothing that we can do to make him safer we decided to terminate his job with us.

See also Catic’s December 13 Response to ALJ’s Pre-Hearing Order (April 10, 2013 response to OSHA investigator).

<sup>42</sup> See D. & O. at 24.

taking adverse actions should be discredited because counsel did not represent the employer when he made the statements. Furthermore, with respect to Catic not being an English speaker, the record as a whole illustrates that the ALJ had no issue understanding Catic during his testimony: the ALJ did not ask Catic if he needed an interpreter; the transcript does not reflect a language barrier; and the ALJ had no issue understanding and crediting some of his testimony about why he terminated Tocci's employment.

The Board is also troubled by the ALJ's lack of an adequate explanation of her findings concerning Catic's February 18, 2014 discovery response (CX-3) and the ALJ's failure to resolve discrepancies in Catic's testimony. Initially, Catic concurred with Tocci's counsel as to the contents and meaning of his statement in CX-3:

Q. Okay. Okay, and then here's your words, further on in your letter. "We really didn't know what Mr. Tocci really wants from us. To avoid further complications with, and Mr. Tocci's concerns for his safety, and there's nothing we can do to make him safer, we decided to terminate his job with us." That's the reason you fired Mr. Tocci, right, in that sentence? Right?

A. Right.<sup>[43]</sup>

Catic later testified that he did not fire Tocci because of his protected activities and safety concerns but instead because of his absenteeism and the need to have his truck driven on a more consistent basis:

JUDGE CHAPMAN: Did you fire him because he was making safety complaints about his truck?

THE WITNESS: No.

JUDGE CHAPMAN: Why did you fire him?

THE WITNESS: I fire him because he's wanted too many days off. I can't afford truck seven days working, six days parked. I—two weeks before this happened, I already tell him to clean his truck. Then he change his mind. He's tell me he's going to be ready on Monday.

That Monday, he came back again. When he get back from the road, he told me again he's going to be ready in six days. I fire him because of that, not because of lights.<sup>[44]</sup>

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<sup>43</sup> Tr. at 39-40.

<sup>44</sup> Tr. at 46-47.

On remand, the discrepancies in Catic's written and oral explanations for terminating Complainant must necessarily be resolved, with explanation, which will in turn allow the Board to assess whether substantial evidence supports the findings should this matter be again appealed to the Board. Otherwise, as previously discussed (*supra* at 5), the Board will find itself once again incapable of conducting an appropriate "substantial evidence" review.<sup>45</sup>

*D. Application of the "clear and convincing" affirmative defense standard*

If Tocci proves by a preponderance of evidence upon remand that his protected activity was a contributing factor in the adverse personnel action, the ALJ must revisit the question of whether Miky Transport may nevertheless avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in any event.

Notwithstanding having held that Tocci failed to prove "contributing factor" causation, in the decision presently under review, the ALJ concluded that Miky Transport demonstrated by clear and convincing evidence that it would have terminated Tocci regardless of his complaint about the headlights because of his excessive absenteeism. D. & O. at 27-28. The fact that the ALJ addressed Respondent's affirmative defense having discounted only Tocci's complaint about the headlights leaves open the question of whether any of his other alleged protected activities might still have influenced Catic's decision to fire Tocci. Consequently, should the ALJ, upon remand, conclude that Tocci's protected activities included more than his complaint about the headlights, the ALJ must necessarily reconsider whether Respondent can prove by clear and convincing evidence that it would nevertheless have fired Tocci in the absence of all of the STAA-protected activity in which Tocci engaged.

Upon reconsideration of Respondent's affirmative defense, assuming the ALJ finds upon remand "contributing factor" causation, an analysis consistent with the Board's holding in *Speegle v. Stone & Webster Co.*<sup>46</sup> is required.<sup>47</sup> It is not evident from the decision currently

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<sup>45</sup> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). It is the Board's "obligation to determine, not simply whether the evidence relied upon by the ALJ supports his findings of fact, but whether the evidence in the record as a whole does." *Dalton v. Copart, Inc.*, ARB No. 01-020, ALJ No. 1999-STA-046, slip op. at 18 (ARB July 19, 2001). The ARB will not disturb an ALJ's credibility determinations provided the ALJ explains "the bases on which he relied to resolve issues of witness credibility and to reconcile conflicts in the evidence." *Svensden v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 2002-AIR-016, slip op. at 7 (ARB Aug. 26, 2004).

<sup>46</sup> *Speegle v. Stone & Webster Co.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014).

<sup>47</sup> Although not found within the ALJ's analysis of whether Miky Transport established its affirmative defense by clear and convincing evidence, within the ALJ's discussion of "contributing factor" causation the ALJ found that Catic "had credible and legitimate reasons for firing Mr. Tocci, *unrelated to any of his complaints about safety.*" D. & O. at 26 (emphasis added). This language is insufficient for the Board to conclude that respondent met its high burden of demonstrating "by clear and convincing evidence that it *would* have taken the same adverse action in the absence of any

under review that the ALJ considered any of the factors that *Speegle* held must be considered in determining whether or not a respondent has met its burden of proving by clear and convincing evidence that it would have taken the same adverse personnel action had the complainant not engaged in protected activity:

To sum up the factors that must be considered in applying the “clear and convincing” defense, we find that the statute requires us to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how “clear” and “convincing” the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer “would have” taken the same adverse actions; and (3) the facts that would change in the “absence of” the protected activity.<sup>[48]</sup>

**CONCLUSION**

For the foregoing reasons, the ALJ’s Decision and Order is **VACATED** and this case is **REMANDED** to the ALJ for reconsideration consistent with this Decision and Order of Remand.

**SO ORDERED.**

  
**PAUL M. IGASAKI**  
Chief Administrative Appeals Judge

  
**E. COOPER BROWN**  
Administrative Appeals Judge

  
**TANYA L. GOLDMAN**  
Administrative Appeals Judge

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protected activity.” 29 C.F.R. § 1978.109 (emphasis added). As the Board noted in *Speegle*, “it is not enough to show that [the employee’s] conduct provided a sufficient independent reason to suspend and fire him . . . . There must be evidence in the record that demonstrates in a convincing manner why the employer ‘would have fired’ the employee.” ARB No. 13-074, slip op. at 11.

<sup>48</sup> *Speegle*, ARB No. 13-074, slip op. at 12.