



In the Matter of:

RODERICK A. CARTER,

ARB CASE NO. 15-050

COMPLAINANT,

ALJ CASE NO. 2012-STA-061

v.

DATE: DEC 22 2016

**CPC LOGISTICS, INC.; CPC MEDICAL
PRODUCTS, LLC; and HOSPIRA
FLEET SERVICES, LLC,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Roderick A. Carter, *pro se*, Hopkins, South Carolina

For the Respondent:

**Michael F. Harris, Esq.; *Harris, Dowell, Fisher & Harris, LLC; Chesterfield,
Missouri***

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce,
Administrative Appeals Judge; and Anuj C. Desai, *Administrative Appeals Judge***

FINAL DECISION AND ORDER

Roderick A. Carter filed a complaint under the whistleblower protection provisions of the Surface Transportation Assistance Act¹ and its implementing regulations² on December 22, 2011, against his employer, CPC Logistics, Inc., and CPC

¹ 49 U.S.C.A. § 31105 (Thomson Reuters 2016) (STAA).

² 29 C.F.R. Part 1978 (2016).

Medical Properties, LLC (collectively CPC), claiming that the company fired him in violation of the STAA. After a hearing, a Department of Labor Administrative Law Judge (ALJ) dismissed his complaint on the grounds that Carter failed to prove that his protected activity of refusing to drive while fatigued was a contributing factor in CPC's termination. Carter appealed to the Administrative Review Board (ARB). We summarily affirm.

BACKGROUND

Initially, we commend the ALJ's detailed and precise factual findings based on the hearing testimony and documentary evidence in this case. To summarize fully but briefly, CPC hired Carter on February 27, 2007, as a tractor-trailer driver, who was part of a six-man relay crew based in Columbia, South Carolina. The crew transported shipping containers loaded with medical equipment from Rocky Mount, North Carolina, where Hospira³ had a production facility, to Jacksonville, Florida, and back again to Rocky Mount.

Carter started driving on the Columbia-Rocky Mount leg, but subsequently acquired numerous warning letters about logging errors, violations of CPC's call-in procedures, and an accident in June 2008 that was found to be his fault and cost more than \$4,400.00 in property damage. CPC issued more warning letters over the next two years and a five-day suspension in August 2010 when a CPC audit revealed numerous discrepancies between the working time Carter noted on the official hours-of-service logs and the time he recorded on his manifests/weekly trip reports submitted to payroll.

In mid-August 2010, CPC assigned Carter to the Columbia-Jacksonville-Columbia leg and teamed him with Kelvin Gordon, who then drove the Columbia-Rocky Mount-Columbia leg. The average driving time for each round-trip leg ranged from 10 to 13 hours. An hour before the end of his trip, one driver would call the relay driver with his estimated time of arrival (ETA) so that the other driver would be available to drive the tractor-trailer on the next leg. The goal was a synchronized schedule to keep Hospira's Rocky Mount facility operational.⁴

Carter and Gordon were not an ideal team. Gordon repeatedly complained to Ron Covert, CPC's regional manager, about Carter's excessive delays and lateness reporting to work and sent Covert a report covering July, August, and September 2011. The report timeline showed that Carter was taking up to 14 hours to make the same drive that had

³ The ALJ dismissed Hospira Fleet Services, LLC, as a joint employer during the hearing because Hospira was CPC's customer and did not employ drivers. Hearing transcript (TR) at 141-42, Decision and Order Denying Complaint (D. & O.) at 40. Carter did not appeal this dismissal.

⁴ TR at 217. The relay team worked five days a week and usually had the weekends off. Both leg drivers would be home in Columbia for their time off during the week.

taken Gordon 11 to 12 hours. The excessive hours delayed Gordon's daily 4:00 p.m. start time about an hour a day. The delay meant that by the end of the week Gordon could not start his run until 7:00 to 9:00 p.m. on Friday night, which shortened his time off.⁵

In August 2011 Gordon sent an e-mail to Covert's supervisor, divisional manager Kenneth Pruitt, relaying his conversation with Carter about the scheduling problems and the importance of teamwork, during which Carter "started to yell and curse" and said that Gordon had done him "a favor" by complaining to Covert about his time delays because "now I'm going to take my breaks and take my time coming back." When Gordon asked Carter if he was concerned about putting his job in jeopardy, he replied, "Ron [Covert] can't fire me. If he could, he would've by now."⁶

After Gordon complained further in September—Carter was "taking over an hour in breaks on the way down and the same on the way back. Please intervene"—Covert reviewed Carter's logs and found prolonged time "on duty but not driving." Covert asked Carter why he used so much time not driving and Carter responded that he probably had to go to the bathroom or maybe he had not been feeling well. Covert then prepared a recap of Carter's hours and forwarded it to Pruitt, who was in charge of about 600 CPC drivers.⁷

Pruitt compared Carter's manifest times with the logs of Carter and two other drivers on the Columbia team during July, August, and September 2011. Based on Carter's average times over the three months, Pruitt recommended to his supervisor, Harold Wallis, Jr., vice president of CPC's eastern operations, that CPC fire Carter.⁸

⁵ Respondent's Exhibit (RX) 35. TR at 149-50, 151-55. Gordon also complained that Carter was supposed to start his run at 2:00 a.m. on Mondays but was frequently late, up to three hours. Gordon gave his ETA times to Carter each afternoon but he was rarely there to take over the tractor-trailer on time.

⁶ RX 26, TR at 156-61. On August 6, 2011, Covert, with Pruitt's approval, sent a general memorandum to all Columbia drivers about reporting to work within an hour of the ETA of their partner; taking too frequent, extended rest breaks; making late deliveries; and ignoring the 2:00 a.m. Monday starting time.

⁷ RX 54. The logs show that Carter started taking breaks an hour or two into his shift. He would drive as little as 16 minutes and as long as three hours before taking a break. Most breaks came after 60 to 90 minutes of driving. RX 52. Covert disciplined another CPC driver for similar behavior on the grounds that he was not coming to work "properly rested." That driver improved his performance. RX 37, TR at 202-23.

⁸ RX 53. In July, Carter averaged 12 hours and 49 minutes, Moore averaged 11 hours and 39 minutes, and Williams averaged 12 hours and 27 minutes and was disciplined for schedule delays. In August Carter averaged 13 hours and 12 minutes, Moore 11 hours and 28 minutes, and Williams 12 hours and 19 minutes. In September, Carter averaged 13 hours and 19 minutes, Moore 12 hours and 30 minutes, and Williams 12 hours and 32 minutes.

Wallis reviewed Gordon's complaints about schedule delays and Carter's disciplinary history, particularly the warning letter concerning his falsification of his logs. Wallis concluded that the progressive disciplinary process had failed to correct Carter's insubordination toward his managers and dispatchers, his violation of CPC's call-in policy, or his excessive hours in driving the Columbia-Jacksonville-Columbia run, and approved Carter's discharge.⁹

Carter filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on December 22, 2011. OSHA dismissed the complaint on September 10, 2012, and Carter timely requested a hearing. The case was initially assigned to an ALJ who denied motions for summary decision that CPC and Hospira filed. The case was then reassigned to an ALJ who held a hearing on February 28, 2014, and issued a decision on April 16, 2015, denying Carter's complaint.

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.¹⁰ The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.¹¹ We uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."¹²

DISCUSSION

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment"

⁹ TR at 160-63. On October 5, 2011, Covert terminated Carter's employment due to his "continued poor job performance and insubordinate behavior." The letter stated that Carter "continuously delayed runs without reasonable explanation" and had "shown a pattern of insubordination." Carter's work record revealed more than 25 violations within the past 30 months for which he was disciplined, which showed "a complete disregard for improvement." RX 36.

¹⁰ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

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

¹² *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

because the employee has engaged in certain protected activities.¹³ The legal burden of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) governs STAA complaints.¹⁴

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.¹⁵ Failure to establish any one of these elements requires dismissal of the complaint.¹⁶

ALJ's credibility determinations

The ALJ's credibility determinations focused on the testimony at the hearing and in the depositions as well as the documentary evidence. In short, he believed Wallis, Pruitt, Olson, Gordon, and Covert, and did not believe Carter. We affirm the ALJ's credibility findings as within his discretion and not "inherently incredible or patently unreasonable."¹⁷

After listening to the hearing testimony, the ALJ found CPC's five witnesses to be more credible than Carter, whose "general demeanor" demonstrated that he believed that he "was unfairly wronged." The ALJ found that Carter's subjective belief "caused inaccurate recollection as well as exaggerated or untruthful testimony" that was sometimes inconsistent with the documentary evidence admitted into the record. The ALJ concluded that throughout his testimony Carter "painted himself in the best possible light" and did not acknowledge his own shortcomings as shown by his disciplinary history.¹⁸

For example, the ALJ did not credit Carter's testimony that, although he did not record rest stops on his manifests, he did record his fuel stops. The ALJ found that Carter's hand-written manifests from the end of June until October did not show a record

¹³ 49 U.S.C.A. § 31105(a)(1).

¹⁴ 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson Reuters 2016).

¹⁵ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

¹⁶ *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, 054; ALJ No. 2003-STA-039, slip op. at 6 (ARB June 29, 2007). CPC did not dispute the ALJ's findings that Carter established that he engaged in protected activity and that his discharge was an adverse action. We affirm these findings. *Jackson v. Union Pac. RR Co.*, ARB No. 13-042, ALJ No. 2012-FRS-017, slip op. at 5 (ARB Mar. 20, 2015).

¹⁷ *Chen v. Dana Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-009, slip op. at 9 (ARB Mar. 31, 2011).

¹⁸ D. & O. at 41.

of any fuel stops during his trips.¹⁹ Further, the ALJ specifically disbelieved Carter when he testified that he did not receive the many disciplinary letters that Covert sent him and that he did not receive a voice mail message from Covert on September 21, 2011, about a change in his work schedule. The ALJ found that because all the letters, including the termination letter, were sent to Carter's home address, "it is not believable that so many of them did not arrive."

Carter's failure to return Covert's September 21 phone call was "consistent with his long pattern of poor communications," such as failing to call in to the dispatcher as required. The ALJ concluded that Carter's work behavior was consistent with his "general preference for doing things on his own schedule and for his own convenience," rather than CPC's schedule and that Carter "was looking out" for himself and "was uninterested in anything that conflicted with what he wanted to do."²⁰

Contributing factor

Carter's evidence consisted of his allegations during his testimony, a copy of CPC's August 6 memo to all drivers, a copy of CPC's submission to OSHA in response to Carter's complaint, and an e-mail from dispatcher Cathy Kiely about her phone calls with Carter and Gordon on October 4-5, 2011, when Gordon told Kiely he was waiting for Carter who "was late almost every night," making the schedule "out of sync."²¹

The ALJ credited dispatcher Olson's testimony that Carter told her on July 15, 2011, that he stopped to rest because he was not feeling well and found this incident to be protected activity.²² The ALJ also found that Carter's protected activity occurred within two and a half months of his discharge, which was "sufficiently close in time that, in the absence of other factors, it could be assumed that he was terminated for refusing to drive when he felt ill in July." The ALJ concluded, however, that there were other factors.²³

¹⁹ RX 52.

²⁰ D. & O. at 28. The ALJ found that after Carter's argument with Gordon, Carter's average round-trip trip to Jacksonville and back increased by 23 minutes in August and seven minutes more in September.

²¹ CX 1-3. In his complaint, Carter stated that he had filed several oral complaints with CPC alleging that the irregularity of his sleep schedule forced him to stop and rest so that he would not drive when he was sleepy. He added that he filed a complaint with CPC through Covert and Pruitt alleging that CPC's policy of not allowing drivers to take rest breaks during their dispatches was unsafe because it would result in sleepy drivers driving.

²² See 49 C.F.R. § 398.4(c) (refusal to operate a truck while ill or fatigued).

²³ D & O. at 40-41.

The ALJ enumerated documentary evidence and testimony on the following factors. First, the ALJ completely disbelieved Carter's testimony that he told Covert, Worthley,²⁴ and Pruitt that his delays were caused by rest breaks due to fatigue. The ALJ found that Covert testified credibly that Carter could not explain his delay on September 26, 2011, when he called him, saying vaguely that he might have been sick. The ALJ credited Pruitt's and Covert's testimony that when they spoke with Carter on September 9 about the need to drive on Saturday to meet Hospira's equipment needs, he said nothing about taking rest breaks because of fatigue. The ALJ concluded that Carter did not, as he testified, tell Covert or Pruitt that he was not going to drive while fatigued and risk killing anybody.

Second, the ALJ noted that after the one instance of protected activity on July 15, 2011, Carter continued to take far longer to complete his run than any of the other drivers. Gordon continued to complain about Carter's delays and tardiness through August and September. Three weeks after the July 15 protected activity Carter sarcastically thanked Gordon for complaining to Covert and said he would take as long as he wanted on his runs and that Covert would not fire him. After Covert's August 6 memorandum to all drivers about the necessity of keeping to the schedule,²⁵ Carter's turnaround time increased.²⁶ Carter demonstrated a threatening demeanor with Pruitt on September 9, 2011, after Pruitt asked him about his altercation with Gordon; Pruitt testified that Carter was rude and belligerent and made veiled threats about being from the South.²⁷ And one week before his discharge, Carter received a disciplinary letter from Covert about his failure to return a phone call regarding his availability for a weekend work assignment.²⁸

Rather than Carter's protected activity on July 15, the ALJ determined that Covert's review of Carter's manifests, prompted by Gordon's continuing complaints, led to Covert's recommendation to discharge Carter. Wallis approved the recommendation after reviewing Carter's disciplinary history, his failure to improve his performance, and his unexplained delays on the Jacksonville run.²⁹ The ALJ concluded that Carter's

²⁴ Scott Worthley was a manager for Hospira, which had a contract with CPC to provide drivers of its leased trucks. Carter testified that he had a "conversation about the safety stuff that was going on," and he complained to Worthley that "they didn't want me to stop and take breaks." TR at 44-46. Carter added that Worthley told him to talk with CPC.

²⁵ RX 28.

²⁶ RX 33-34. On September 26 and 28, Carter's logs showed on-duty, not-driving times of more than three hours.

²⁷ TR at 249-50.

²⁸ RX 31.

²⁹ D. & O. at 42. Carter was late starting or delayed his partner's runs 33 times between June 27 and September 28, 2011. RX 35.

protected activity of communicating with Olson on July 15 played no part in the decision to fire Carter.³⁰ Substantial evidence amply supports the ALJ's factual findings and his conclusion that Carter's sole protected activity did not contribute to his discharge from CPC. Therefore, we affirm the ALJ's dismissal of Carter's complaint.³¹

SO ORDERED.


PAUL M. IGASAKI
Chief Administrative Appeals Judge


JOANNE ROYCE
Administrative Appeals Judge


ANUJ C. DESAI
Administrative Appeals Judge

³⁰ D. & O. at 42. The ALJ determined that he need not address CPC's affirmative defense since Carter had failed to meet his burden of showing that his protected activity was a contributing factor in his discharge. D. & O. at 42.

³¹ On appeal, Carter argued that the ALJ erred in considering CPC's evidence because the ARB had recently held that in determining whether a complainant had established that his protected activity was a contributing factor in the adverse action, an ALJ may consider only the complainant's evidence. *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). Subsequently, the ARB overruled *Fordham* and held that an ALJ must consider "all the relevant, admissible evidence and make a factual determination, under the preponderance-of-the-evidence standard of proof, about what happened: is it more likely than not that the employee's protected activity played a role, any role whatsoever, in the adverse personnel action." *Palmer v. Canadian Nat'l RR/Illinois Central RR Co.*, ARB No. 16-035, ARB No. 2014-FRS-154, slip op. at 59 (ARB Sept. 30, 2016).