In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY

and

MICHAEL BECKER,

COMPLAINANT,

v.

SMITHSTONIAN MATERIALS, LLC,

RESPONDENT.

ARB CASE NO. 15-081

ALJ CASE NO. 2013-STA-050

DATE: December 19, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Nicholas C. Geale, Esq.; Ann Rosenthal, *Esq.*; Robert W. Swain, *Esq.*; Mark Lerner, *Esq.*; *U.S. Department of Labor,* Washington, District of Columbia

For the Respondent:
Mark P. Murphy, *Esq.*; *Milwaukee, Wisconsin*

Before: Joanne Royce, *Administrative Appeals Judge*; Tanya L. Goldman, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.[1] Complainant Michael Becker filed a complaint alleging that Respondent Smithstonian Materials, LLC violated the STAA when it discharged

[1] 49 U.S.C.A. § 31105 (Thomson Reuters 2016); 29 C.F.R. Part 1978 (2016).

him for refusing to drive an unsafe vehicle. A Department of Labor Administrative Law Judge (ALJ) conducted a hearing, after which he concluded that Becker engaged in STAA-protected activity and Smithstonian retaliated against Becker by suspending him for a single day. Smithstonian appealed the ALJ's decision to the Administrative Review Board (ARB or Board). For the following reasons, the Board remands this case to the ALJ for further consideration consistent with this decision.

BACKGROUND

Smithstonian is a landscaping and snow removal company in Brookfield, Wisconsin owned by James Smith. Smithstonian employed Becker as a field supervisor from April 2009 until November 30, 2010. During his employment with Smithstonian, Becker had a commercial driver's license and his duties included operating company trucks, supervising landscaping jobs, and inspecting equipment.

On November 29, 2010, Smith directed Becker to transport a load of gravel using the company's 1992 GMC TopKick dump truck. During this assignment, Becker had difficulty steering the vehicle. Becker believed that the truck's steering failure was caused by a defective kingpin. Becker described the kingpin as the "primary bolt in the front steering" that "holds the tire straight with the road."[2] Becker also discovered that the truck lacked proper registration. Becker complained to Smith about the truck's mechanical problems and lack of registration. Smithstonian's mechanic, Chris Schultz, examined the truck after Becker returned it to Smithstonian's shop later that day. Schultz and Becker agreed that the truck should be taken out of service until the kingpin could be replaced. But when Schultz attempted to take the TopKick out of service, Smith told Schultz that he (Smith) was the only "one who takes vehicles out of service."[3] Becker told Smith that he would not drive the truck again until it was "fixed."[4] According to Smith, he replied to Becker by telling him to "[d]rive what I tell you to drive or stay home."[5]

On November 30, 2010, Smith instructed Becker to take equipment to a job site using the TopKick truck. The parties do not dispute that Becker told Smith that he would not drive the TopKick because it was "unsafe,"[6] but they disagree about the words that were exchanged between Becker and Smith as a result of Becker's refusal to drive. Becker testified that after he refused to drive, Smith discharged him from employment:

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[2] Transcript (Tr.) at 87, 89.

[3] Joint Stipulations and Document Authentication and Admissibility (Joint Stipulations) ¶ 21; D. & O. at 24.

[4] Smith testified that Becker told him that he would not drive the truck until the "hose is fixed" (Tr. at 363) but did not say anything about fixing the kingpin.

[5] Tr. at 359.

[6] Joint Stipulations ¶ 25.

> He became upset. I was standing by the truck door, the TopKick. He walked up to me pushing me out of the way. He says, "Get the fuck out of the way"; jumps up in the cab of the truck; wiggles the wheel; gets out of the truck; comes up to me. He says, "Hook that truck up to the trailer and get headed to the job." I said, "Man, I'm not driving that truck today. It has no registration and the kingpin is shot." Stepping into me, he says, "Get in that fucking truck now." And I said, "No, I'm not driving that truck." And, again, he says, "You're lucky to have a job." And I said, "Hey, I'm not driving the truck." And he walks into me more, "Get into that fucking truck. Drive it to the job." And I said, "No, couldn't we take another truck?" And he said, "That's it. Leave my shit here. You're done"—or "Go home." And I said, "Jim, think about this," and he says, "That's it. You're done. Bye-bye," gets in his truck and leaves. I know at that moment, I'm fired.[7]

Smith testified that he did not discharge Becker and that his response to the refusal was to tell Becker to go home for the day:

> Q. After Mr. Becker indicated that he wasn't going to be driving this vehicle, what did you tell him?
> A. "Go home for the day."
> Q. Did you fire him?
> A. No.
> Q. Did you intend to fire him?
> A. No.
> Q. Were you expecting him back the next day?
> A. Yes, and the day after that, and the day after that, and the day after that.[8]

Immediately following his refusal to drive, Becker drove a different company truck to his home to retrieve the keys for his own vehicle that was on Smithstonian's premises. He returned to Smithstonian, left company equipment in the company vehicle, and drove his own vehicle to his home. Later that day Smith called Becker and instructed him to return a phone and keys. The parties agree that Becker never told Smith that he quit. On December 3, 2010, Becker returned to Smithstonian to drop off the phone and keys.[9]

Becker filed a STAA complaint with the Occupational Safety and Health Administration (OSHA) on January 3, 2011. OSHA investigated the complaint and on May 8, 2013, issued an

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7 Tr. at 93.

8 *Id*. at 366-67.

9 The parties dispute the content of further exchanges between Becker and Smithstonian, including Becker's assertion that he asked for his job back and testimony presented during Becker's unemployment compensation hearing.

order concluding that Smithstonian violated the STAA by discharging Becker in retaliation for engaging in STAA-protected activity. OSHA awarded Becker back pay and injunctive relief. Smithstonian objected to OSHA's findings and requested a hearing before an ALJ. On or about June 6, 2013, the Assistant Secretary of Labor for Occupational Safety and Health (OSH) entered an appearance as the Prosecuting Party.

The ALJ conducted the hearing on May 14-15, 2014, and on July 31, 2015, issued a Decision and Order Awarding Damages (D. & O.). The ALJ concluded that Becker engaged in STAA-protected activity on and before November 30, 2010, and Smithstonian retaliated against Becker by suspending him for a single day. The ALJ awarded Becker $160 in backpay, expungement of negative references related to his STAA-protected activity from his personnel file, and a neutral and non-disparaging employment reference. The ALJ also ordered Smithstonian to post a notice of employees' OSHA whistleblower rights and, because the company "demonstrated a reckless and callous disregard for Mr. Becker's rights as well as intent to violate the law,"[10] he awarded Becker $2,000 in punitive damages. The OSH Assistant Secretary appealed the ALJ's decision to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions on the Secretary's behalf in STAA cases.[11] Upon appeal of an ALJ's decision, the ARB reviews questions of law de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence of record.[12]

DISCUSSION

The STAA provides that a person may not "discharge an employee, or discipline or discriminate against an employee" because the employee has engaged in certain protected activities, including participating in proceedings relating to the violation of a commercial motor vehicle safety regulation or refusing to operate a motor vehicle when doing so would violate a regulation related to safety.[13] STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[14]

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10 D. & O. at 31.

11 Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

12 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines,* ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citation omitted).

13 49 U.S.C.A. § 31105(a)(1).

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

To prevail on an 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. If the complainant meets this burden, the employer may avoid liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[15] "Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[16] As the employer, Smithstonian has a "steep burden" under the AIR 21 burden-shifting framework; the burden is intentionally high because "Congress intended to be protective of plaintiff-employees."[17]

The record supports the ALJ's conclusion that Becker engaged in STAA-protected activity on November 29 and 30 when he complained about the registration status of the Top Kick.[18] And there is no dispute that Becker refused to drive the TopKick because he evaluated its condition and concluded that the truck could not be operated safely.[19] The ALJ held that Becker's concerns about safety were reasonable and that Becker sought correction of the condition he perceived to be unsafe.[20] The ALJ's determination that Becker engaged in STAA-protected activity is supported by substantial evidence of record and in accordance with applicable law, and accordingly, is affirmed.

The ALJ also held that Smithstonian subjected Becker to an adverse action in retaliation for his protected activity, and therefore violated the STAA. But he concluded that the Prosecuting Party "failed to carry its burden of demonstrating that Mr. Becker was terminated, and that it has only shown that Mr. Becker was suspended on November 30, 2010 for the remainder of that day."[21] We cannot agree with this conclusion because the ALJ failed to apply the proper legal standard for assessing an employee's actions after being reprimanded for refusing to perform a prohibited task.

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15 49 U.S.C.A. § 42121(b)(2)(B).

16 *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015).

17 *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 160, 162 (3d Cir. 2013).

18 *See* Joint Stipulation, ¶¶ 16 ("On November 29 and 30, 2010, Michael Becker orally complained to Jim Smith that Smithstonian Materials, LLC's 1992 GMC TopKick dump truck was not registered with the state of Wisconsin.") and 17 ("On November 29 and 30, 2010, Smithstonian Materials, LLC's 1992 GMC TopKick dump truck was not registered in the state of Wisconsin.").

19 *Id.*, ¶ 25 ("On November 20, 2010, Michael Becker stated to Jim Smith that he would not drive Smithstonian Material, LLC's 1992 GMC TopKick dump truck because it was unsafe.").

20 D. & O. at 24.

21 *Id*. at 26.

We have repeatedly held that "an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, [may] constitute the employer's discharge of the employee, and therefore an adverse employment action."[22] Furthermore, it is improper for an employer to treat an employee's equivocal statement as a resignation and, based on its interpretation, end the employment relationship.[23]

It is also possible that an employer may use language or engage in conduct that would lead an employee to believe his employment has been terminated, such as demanding the return of company equipment.[24] In such cases a court's analysis should focus on the reasonable interpretation of the employee, not whether formal words denoting a discharge were in fact spoken.[25] It is therefore essential for the ALJ to evaluate Becker's interpretation of Smith's reaction to his November 30, 2010 refusal to drive.

We acknowledge that the ALJ found neither Becker nor Smith to be credible witnesses and instead based his ruling on the testimony of Carillo, an employee who was not involved in the exchange between Becker and Smith:

> Q. And did you hear anything between either of them about Michael Becker going home that day?
> MS. WORDEN: Objection, leading.
> MR. MURPHY: It's a foundation question.
> JUDGE ALMANZA: For purposes of foundation, I'll allow it.
> BY MR. MURPHY:
> Q. So you can answer that.
> A. Yeah.

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[22] *Hoffman v. NOCO Energy Corp.*, ARB No. 15-070, 16-009; ALJ No. 2014-STA-055, slip op. at 5, n.13 (ARB June 30, 2017); *see also.*, *Klosterman v. E.J. Davies*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Sept. 30, 2010) (*citing Minne v. Star Air, Inc*., ALJ No. 2004-STA-026 (ARB Oct. 31, 2007)).

[23] *Hood v. R&M Pro Transp., LLC*, ARB No. 15-010, ALJ No. 2012-STA-036, slip op. at 5 (ARB Dec. 4, 2015) (rejecting an employer's argument that an employee who, upon being asked to perform an allegedly prohibited task, replied that he was not going to do it, that he was "done," and would clean out his truck, had resigned from employment).

[24] *See, e,g, Ass't Sec'y & Phillips v. MJB Contractors*, No. 1992-STA-022 (Sec'y Oct. 6, 1992) (employer effectively fired complainant when the supervisor told complainant either to drive an unsafe vehicle or turn in his keys and go home).

[25] *See Ass't Sec'y & Lajoie v. Envtl. Mgmt. Sys.,* No. 1990-STA-031 (Sec'y Oct. 27, 1992) (*citing NLRB v. Champ Corp*., 933 F.2d 688, 692-694 (9th Cir. 1990) (no set words necessary to constitute discharge; words or conduct logically leading employee to believe his tenure is terminated are sufficient; test depends on reasonable inferences employee could draw from employer's statement or conduct)).

> Q. What did you hear, if anything, about Michael Becker going home?
> A. I remember them talking about the truck was fixed, and it was ready for him to drive and Michael Becker saying something. Like I said, I was walking back and forth from the shop, and I remember Mr. Smith saying, "Go home for the day."[26]

The ALJ found Carillo to be a credible witness, and he determined that Carillo "unequivocally stated that Mr. Smith told Mr. Becker to 'go home for the day.'"[27] But accepting Carillo's short statement as true does not negate the fact that Smith made statements and took actions that Becker could have reasonably interpreted as a discharge. In *Klosterman*, under similar facts, the Board found constructive discharge when the employer ordered the employee to drive or go home:

> Turning to the critical last day of work, the ALJ found that Klosterman complained to Vordermeier on December 20, 2005, about the condition of the truck he was to drive. She also found that Vordermeier told Klosterman to drive it or go home. The ALJ found that Klosterman walked out when Vordermeier refused to assign him to a different truck. After Klosterman left, Vordermeier sent a letter to Bisignano stating that Klosterman had quit and was no longer employed with E.J. Davies. Implicit in the ALJ's findings is the reasonable inference that Vordermeier affirmatively took steps to perfect the end of Klosterman's employment by exploiting Klosterman's ambiguous departure on December 20, 2005.[28]

Here, the parties agree that, "[o]n November 30, 2010, Michael Becker never told Jim Smith that he quit."[29] Smith admitted that he told Becker to "[d]rive what I tell you to drive or stay home."[30] And although Smith testified that he expected Becker to return to work the following day, the ALJ acknowledged that, if Becker "was expected to return the next day, then there would be no need for the keys to be returned."[31] Inconsistencies such as these should be addressed in the context of applying the Board precedent outlined above.

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26 Tr. at 188-89.

27 D. & O. at 28.

28 *Klosterman*, ARB No. 08-035, slip op. at 8 (citations omitted).

29 Joint Stipulation ¶ 29.

30 Tr. at 359.

31 D. & O. at 27

Because the ALJ did not apply the correct legal standard for determining whether Smithstonian discharged Becker, we cannot agree with the ALJ's conclusion that Becker was suspended for a single day. Although our review under the STAA requires that we give deference to the ALJ's findings of fact, the question of whether Becker was discharged involves conclusions of law that we review de novo. We must therefore vacate the ALJ's ruling that Smithstonian did not fire Becker and remand the case so the ALJ can review the evidence under the proper legal standard.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order Awarding Damages, issued July 31, 2015, is **AFFIRMED, IN PART, AND VACATED, IN PART**. The ALJ's determination that Smithstonian violated the STAA by retaliating against Becker for engaging in protected activity is **AFFIRMED**; the ALJ's ruling that Smithstonian did not discharge Becker from employment is **VACATED**. The case is accordingly **REMANDED** to the ALJ for further consideration consistent with this Decision and Order of Remand.

SO ORDERED.

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JOANNE ROYCE
Administrative Appeals Judge

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TANYA L. GOLDMAN
Administrative Appeals Judge

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LEONARD J. HOWIE III
Administrative Appeals Judge