



In the Matter of:

FERNANDO DEMECO WHITE,

ARB CASE NO. 16-024

COMPLAINANT,

ALJ CASE NO. 2011-STA-011

v.

DATE: January 26, 2017

ACTION EXPEDITING, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Fernando Demeco White, *pro se*, Clarkston, Georgia

For the Respondent:

Thomas T. Tate, Esq.; *Anderson, Tate & Carr, P.C.*; Duluth, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2016), and its implementing regulations, 29 C.F.R. Part 1978 (2016). Fernando Demeco White filed a complaint with the

Occupational Safety and Health Administration (OSHA) alleging that his employer, Respondent Action Expediting, Inc. (Action Expediting or Company), terminated his employment in violation of the STAA. OSHA dismissed the complaint. On October 31, 2012, after a hearing, an Administrative Law Judge (ALJ) entered a Decision and Order denying the complaint. White petitioned the Administrative Review Board (ARB) for review. Upon review, the ARB issued a Decision and Order remanding the case to the ALJ for reconsideration. On remand, the ALJ again denied the complaint in a Decision and Order issued November 13, 2015 (D. & O.). For the following reasons, the Board summarily affirms the ALJ's decision.¹

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA and its implementing regulations.² In reviewing a Department of Labor ALJ's STAA decisions, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence.³ The ARB reviews the ALJ's conclusions of law de novo.⁴

DISCUSSION

This case's factual background was detailed in the ARB's previous decision in this matter, *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014). In that decision, the Board noted that the ALJ's findings that White had engaged in STAA-protected activity and that White's employment termination was an adverse action covered under the Act were not challenged on appeal; that the only issue before the Board

¹ We affirm the ALJ's dismissal of White's claim but do not endorse the ALJ's analysis of every legal issue. Because we focus on the ALJ's contributing factor ruling, we make no determination regarding the ALJ's ruling on whether Respondent proved by clear and convincing evidence that it would have taken the same action absent protected activity.

² 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).

³ 29 C.F.R. § 1978.110(b); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). In conducting our review, the ARB will uphold an ALJ's findings of fact to the extent they are supported by substantial evidence even if there is also substantial evidence for the other party, and even if the Board "would justifiably have made a different choice" had the matter been before us de novo." *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

⁴ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004) (citations omitted).

concerned the ALJ's finding of no causal connection between the protected activity and White's employment termination. The Board held that the ALJ failed to apply the proper STAA burden of proof standards regarding whether the protected activity was a contributing factor to the adverse action, and for that reason remanded the case for reconsideration of "contributing factor" causation under the proper legal standard. The Board also instructed that should the ALJ find that Complainant meets this burden of proof, Respondent may nevertheless avoid liability if it is able, in turn, to prove by clear and convincing evidence that it would have taken the same adverse action absent any STAA-protected activity.

On remand, the ALJ found that Complainant's version of the events of September 15-16, 2009, that led to his employment termination were not credible or consistent and were contradicted by the evidence and credible testimony of record—specifically the testimony of the company's safety director J. Wentz, White's co-driver M. Smith, dispatcher L. Kyle, and his supervisor R. Baxter. The ALJ found that White failed to establish by a preponderance of the evidence that his STAA-protected activities, i.e., reports to his immediate supervisors involving sleeper berth split-time and his refusal to drive while ill, were contributing factors in Respondent's decision to terminate his employment.

Lastly, the ALJ found that Respondent established by clear and convincing evidence that it would have taken the same adverse action against White absent any STAA-protected activity. The ALJ found that Respondent proved by clear and convincing evidence that it terminated White's employment because he belligerently refused to follow orders to turn over the truck keys to his co-driver when directed and because he refused to accept medical treatment, transportation, and related lodging offered by Respondent. The ALJ weighed the evidence regarding White's alleged medical issue and found that Respondent did not order Complainant to drive the truck while ill but offered ambulance transportation and hotel lodging if necessary, and directed White to turn the truck over to the co-driver to continue the route.

Upon careful examination of the ALJ's Decision and Order, and having considered the parties' respective arguments on appeal, the Board finds that substantial evidence of record supports the ALJ's factual findings that Complainant failed to establish that his STAA-protected activity was a contributing factor in his employment termination. The ALJ thoroughly examined all of White's evidence and explained why he did not credit White's version of the events on September 15-16. Additionally, none of the arguments White has presented on appeal persuade us to disturb the ALJ's ruling dismissing his complaint.

CONCLUSION

The ALJ's Decision and Order on Remand of November 13, 2015, dismissing White's complaint is **AFFIRMED**.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge