In the Matter of:

WAYNE MAULDIN,

COMPLAINANT,

v.

G & K SERVICES,

RESPONDENT.

ARB CASE NO. 16-059

ALJ CASE NO. 2015-STA-054

DATE: June 25, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Wayne Mauldin, pro se; *Mesquite, Texas*

For the Respondent:
S. Libby Henninger, Esq.; *Littler Mendelson, PC*; Washington, District of Columbia

Before: Joanne Royce, *Administrative Appeals Judge*; and Leonard B. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.[1] Wayne Mauldin filed a complaint alleging that G & K Services (G & K) violated the STAA's whistleblower protection provisions by firing him after he refused to drive in violation of the hours-of-service regulation. Following a hearing, a Department of Labor Administrative Law Judge (ALJ) dismissed Mauldin's complaint. Mauldin appealed to the Administrative Review Board (ARB or Board). We affirm.

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[1] 49 U.S.C.A. § 31105 (Thomson/West 2016); 29 C.F.R. Part 1978 (2017).

BACKGROUND

Wayne Mauldin started as a route driver with Ace Image Wear, a laundry and linens supply company that G & K Services bought in 2012.[2] With Ace, Mauldin earned commissions, making about $550.00 a week; with G & K he negotiated a weekly salary of $813.00, delivering linen supplies and servicing customers in the Dallas-Fort Worth area as a route sales/service representative.

Starting in November 2013, Mauldin became a relief driver, covering for others who were on vacation or out sick. In April 2014, he complained to his new route manager, Mike Carter, that he was working too many hours and violating hours-of-service regulations in running delivery routes. He also reported to the Wage and Hour Division of the Department of Labor that he was working more than 40 hours a week but was not being paid overtime for the extra hours.

On May 22, 2014, Mauldin hurt his shoulder and back while lifting a bag of linens. His doctor put him on restrictions of no lifting, pushing, or driving because of his pain medications. G & K assigned him helpers to do the lifting and driving, but he complained to Carter and the human resources (HR) department that some were not helpful, extending the duration of the delivery routes, and refusing to drive the truck.

In June and July 2014, Mauldin continued to complain to HR about working excessive hours and questioned his exempt employee status because he did not get paid for working extra hours to finish the deliveries on his route. After HR explained to Mauldin that as an exempt salaried employee he was not eligible for overtime payment, Mauldin retorted that the company's payment of overtime to the drivers would be cheaper than paying federal fines for hours-of-service violations.

On July 14, 2014, Mauldin's doctor released him for full duty. Mauldin then had to recertify his medical clearance with the Department of Transportation. At week's end, he still needed to recertify so that he could drive, and Carter instructed him to get it done during the weekend or on his own time when he got a chance during the next week's work.

On July 21, HR informed Mauldin that its review of his electronic drivers' logs showed no violations of hours of service and asked him to provide details and documentation of such violations. Mauldin sent HR a list of eleven weeks during which he claimed to have worked more than 60 hours and 12 days in excess of 14; he said the list came from his telephone app.

On July 23, 2014, Mauldin came to work at 4:30 a.m. to run Route 46 and after loading up, he started off. Shortly thereafter, Carter called him and asked if he had obtained his medical certification, allowing him to drive. When Mauldin responded negatively, Carter ordered him to immediately return to the shop and obtain the clearance when the medical agency opened at 8:00 a.m.

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[2] The facts are based on the ALJ's detailed delineation of the testamentary and documentary evidence he admitted at the hearing. Decision & Order (D & O) at 5-24.

Carter scolded Mauldin for failing to obtain the certification the day before since he had returned from his route deliveries before 3:00 p.m. Mauldin responded that he had not felt like getting recertified the day before after working ten hours and that Carter should have arranged for him to complete his dispatch earlier in the day so he would have had time to get recertified. Mauldin added that he intended to go home after he had his recertification because he was working too many hours, but Carter instructed him to come back and run the route, to cover as many stops as he could.

Mauldin obtained his certificate and returned about 10:30 a.m. to run his route. At about 4:30 p.m. he decided to quit and return to the shop, claiming that he was tired and feared exceeding the 14-hour regulation and had not had a lunch break. He and Carter had an extended conversation, which Mauldin secretly taped, about not finishing more stops on his route. Mauldin then filed another overtime complaint with DOL's Wage and Hour Division and an hours-of-service complaint with G & K's HR department.

On August 1, 2014, G & K informed Mauldin that its review of his timesheets showed that he was never asked to be on duty more than 14 hours on any of the dates he had alleged, that he was exempt from set hours and overtime, and that the company would handle separately his refusal to finish the route on July 23. Mauldin replied that G & K's calculations failed to consider the on-duty time he spent on administrative tasks. On August 4, G & K fired him for performance deficiencies.[3]

Mauldin filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) alleging that G & K terminated his employment for refusing to violate the hours-of-service regulations as a commercial motor vehicle driver. OSHA dismissed his complaint on April 21, 2015, and Mauldin timely requested a hearing, which was held on November 3, 2015, in Dallas, Texas. On April 14, 2016, the ALJ dismissed Mauldin's complaint on the grounds that he had failed to demonstrate that he had engaged in any activity that the STAA protects. He appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the authority to this Board to issue final agency decisions in STAA cases.[4] 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.[5] We

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[3] Respondent's Exhibit (RX) 4-7, 16-17.

[4] 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).

[5] 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) (citations omitted).

uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."[6]

DISCUSSION

Under the STAA, an employer may not discharge, discipline, or discriminate against an employee because the employee has engaged in certain protected activities.[7] 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).[8]

To prevail on a STAA claim, an employee 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.[9] If the employee does not prove one of these requisite elements, the entire claim fails.[10] The employer may escape 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.[11]

The ALJ's decision is comprehensive, well-reasoned, and amply supported by his credibility determinations.[12] Further, substantial evidence supports the ALJ's factual finding that

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6 *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

7 The STAA provides: (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—(B) 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; . . . 49 U.S.C.A. § 31105(a)(1)(B)(i).

8 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson Reuters 2016).

9 49 U.S.C.A. § 42121(b)(2)(B)(iii).

10 *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 11-032, ALJ No. 2008-STA-011, slip op. at 5 (ARB Dec. 19, 2012) (citing *West v. Kasbar, Inc./Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005)).

11 49 U.S.C.A. § 42121(b)(2)(B)(iv).

12 The ALJ cited *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026 (ARB Oct. 31, 2007) for the premise that if a complainant's protected activity is a refusal to drive under 49 U.S.C.A. § 31105(a)(1)(B)(i), he must prove that driving would have resulted in an actual violation. But more recent ARB precedent holds that the complainant must demonstrate a subjectively and objectively reasonable belief of a violation. *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). In *Koch Foods, Inc. v. Sec'y Dep't of Labor*, 712 F.3d 476, 486 (11th Cir. 2013), the Eleventh Circuit ruled that refusals to drive must be

the only protected activity that played any role in Mauldin's firing was his refusal to violate the hours of service on July 23, 2014. In a telephone conference call prior to the hearing, Mauldin stated that the ALJ could "disregard any other allegations of protected activity" that he had referenced in his complaint.[13]

On appeal, Mauldin objected to "the ALJ's determination in regards to ruling for dismissal in the face of acknowledging that multiple protected activities had taken place and then misquoting/misrepresenting the sole stipulation used as for [sic] basis for dismissal." Mauldin argues that the ALJ should have considered all his complaints to HR and Carter about excessive hours to be protected instead of focusing on his stipulation.[14] But Mauldin himself testified that that he got hired for a 40-hour work week, "and they just kept piling on the hours, adding on additional stops, building up the routes, and I wasn't getting paid for anything over 40." That started in November 2013 and he did not complain until next April, just "groused about the hours. That was pretty much it. It was just normal gripe."[15]

The ARB reviews complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law and with a degree of adjudicative latitude."[16] But we are also mindful of our duty to remain impartial, and thus, we must refrain from becoming an advocate for the *pro se* litigant."[17] Similarly, an ALJ "must accord a party appearing *pro se* fair and equal treatment, but a *pro se* litigant cannot shift the burden of litigating his case to the courts, or avoid the risks of failure that may result from his decision to forego expert assistance."

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based on an actual violation. But we are not bound by the Eleventh Circuit's opinion as this case falls within the ambit of a different circuit. Instead, we continue to adhere to the Board's opinion in *Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-061, slip op. at 3 n.6 (ARB May 30, 2014)(holding that a complainant's refusal to drive, based upon a subjectively and objectively reasonable belief in a violation, constitutes protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i)); *see also Boone v. TFE, Inc.*, No. 1990-STA-007, slip op. at 3 (Sec'y July 17, 1991), *aff'd Trans Fleet Enters., Inc. v. Boone*, 987 F.2d 1000, 1004 (4th Cir. 1992)(a dispatch that *contemplates* a violation of the hours-of-service regulations violates the refusal to drive provision even if the driver had available driving time at the outset of the run).

[13] Order dated Oct. 22, 2015.

[14] Complainant's brief, un-numbered.

[15] TR at 12.

[16] *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010) (quotation omitted).

[17] *See Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005).

Thus, while an ALJ may assist pro se litigants, "the judge also has a duty of impartiality and must refrain from becoming an advocate for the *pro se* litigant."[18]

The ALJ questioned Mauldin at the hearing about his stipulation. "I want to clarify it for the record . . . and what you said on the phone is consistent with what I've heard you testify today, which is the reason they fired you was what happened on the 23rd. Everything else was kind of background noise . . . ."[19] Near the end of the hearing, Mauldin again confirmed his stipulation. After the ALJ asked Mauldin about his "ongoing" complaints to the HR department, Mauldin replied that he started complaining to HR prior to July 23, when he refused to exceed the hours of service. But when the ALJ remarked that Mauldin had told him those prior complaints had "nothing to do" with his firing, Mauldin agreed that the reason G & K fired him "was all based on what happened on the 23rd and nothing else."[20]

We find no error in the ALJ's determination to hold Mauldin to his stipulation that the only protected activity that played any role in his termination was his refusal to violate the hours-of-service regulations on July 32, 2014. The ALJ nevertheless elicited considerable evidence from Mauldin about his repeated complaints about excessive hours and not being paid overtime for more than 40 hours a week. But Mauldin agreed that these complaints resulted in no adverse employment action. To the contrary, Carter testified that when Mauldin complained about not getting paid for working more than 40 hours a week, Carter replied that he would set up a schedule to let him and the other relief drivers know the day before what routes they would drive so they could estimate the hours needed. Carter testified that the schedule accommodated the drivers by allowing them to plan their daily schedule and know what time they needed to start so Mauldin "wouldn't have to be there for two hours doing nothing, standing around waiting."

To support his overtime complaints, Mauldin claimed that his wage agreement with G & K specified a 40-hour week. But during G & K's acquisition of Ace, Mauldin negotiated higher wages than he had been making with Ace on commission, and accepted an exempt position with a weekly salary of $813.00. The G & K offer letter specifies no set number of hours.[21] And Carter explained that Mauldin was an exempt employee with no set hours and did not have to arrive at 4:30 a.m. every day; that was his choice. The schedule allowed Mauldin to adjust his hours to the route he was covering. "Some routes are longer; some are shorter," Carter commented.[22] In any case, as the ALJ found, Mauldin's wage and hour complaints focused on

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18 *Pik v. Credit Suisse, AG*, ARB No. 11-034, ALJ No. 2011-SOX-006, slip op. at 3 (ARB May 31, 2012) (quotation omitted) ("pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel").

19 Hearing transcript (TR) at 38-39.

20 TR at 128-29, 132-33.

21 RX 5.

22 TR at 76-77, 79. *See* RX 24.

G&K's failure to pay overtime, rather than on perceived safety violations and, as such, were not protected activity under STAA. [23]

Mauldin also objected to the ALJ's credibility determinations, arguing that his testimony was not tainted and that the ALJ failed to question the credibility of G & K's witnesses regarding their statements and handling of evidence.[24]

The ARB accords special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses."[25] The ARB generally defers to an ALJ's demeanor-based credibility decisions where supported by substantial evidence of record, unless they are "inherently incredible or patently unreasonable." Lesser weight is accorded to a credibility finding based on other aspects of a witness's testimony, such as internal discrepancies or witness self-interest. "[C]redibility findings based on internal inconsistency, inherent improbability, important discrepancies, impeachment or witness self-interest are entitled to the weight which 'in reason and in the light of judicial experience they deserve.'"[26]

In any event, "all findings of fact, including those based on credibility, must be supported by substantial evidence."[27] The ARB may set aside a decision if "we 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes.'"[28]

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23 *Mace v. Ona Delivery Sys., Inc*., No. 1991-STA-010, slip op. at 4 (Sec'y Jan. 27, 1992)(complainant's complaints centered on extra job assignments, not safety violations, and thus were not protected under STAA); *see also Clement v. Milwaukee Transport Servs., Inc*., ARB No. 02-025, ALJ No. 2001-STA-006, slip op. at 6, n.5 (ARB Aug. 29, 2003)(matters relating to Fair Labor Standards Act, such as practice of not paying employees for attending company meetings, are beyond scope of STAA).

24 Complainant's Brief, un-numbered.

25 *Litt v. Republic Serv. of S. Nev*., ARB No. 08-130, ALJ No. 2006-STA-014, slip op. at 8-9 (ARB Aug. 31, 2010) (This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records.").

26 *Nevarez v. Werner Enters,* ARB No. 14-010, ALJ No. 2013-STA-012, slip op. at 7 (ARB Oct. 30, 2015) (citations omitted).

27 *NLRB v. Cutting, Inc*., 701 F.2d at 663 (citing *Universal Camera Corp.*, 340 U.S. 474, 496(1951)).

28 *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477-478 (1951)).

The ALJ found Mauldin's testimony to be "credible in some regards, but significantly tainted by his anger that Respondent was not paying him fairly. . . ."[29] According to the ALJ, Mauldin was "inclined to overstate time in order to establish a potential hours of service violation . . . ." Ultimately, the ALJ accorded little credence to Mauldin's accounts of excessive hours, and substantial evidence supports both this credibility finding as well as the ALJ's associated conclusion that Mauldin's frustration with his status as an exempt salaried employee with no set hours fueled his use of DOT hours-of-service complaints as leverage in trying to get paid for more hours. As the ALJ noted: "Complainant was unhappy he was not being paid what he thought he deserved and was cutting routes short because of it."[30]

The ALJ cited testimony demonstrating that by the summer of 2014 Mauldin's mounting anger about his wages led him repeatedly to refuse to complete his assigned route after a doctor's appointment. At least twice, Mauldin told his manager that "since he was getting paid the same either way, he saw no point in doing more work."[31] On July 15, 2014, HR emailed Mauldin explaining once again that, as an exempt employee, Mauldin was not entitled to overtime pay. Mauldin argued to the contrary and observed that it would be cheaper to pay overtime than to pay fines for hours-of-service violations. The ALJ found this remark to be one of the most "probative pieces of evidence of Mauldin's use of hours-of-service violations as leverage" to get G & K to pay him for more hours. On July 16, 2014, Mauldin neither showed up for work nor notified Respondent thereof. [32]

The ALJ presented these findings to set the stage for his ultimate finding that Mauldin's July 23, 2014 refusal to drive did not constitute protected activity. As noted, the ARB has held that for a refusal to be protected under the STAA, the complainant must demonstrate a subjectively and objectively reasonable belief of a violation.[33] Further, a dispatch that *contemplates* a violation of the hours-of-service regulations violates the refusal to drive provision even if the driver had available driving-time at the outset of the run.[34]

The ALJ reviewed the specific evidence regarding Mauldin's July 23, 2014 refusal to drive:

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[29] D. & O at 27.

[30] *Id*.

[31] *Id*.

[32] *Id*. at 25. Carter testified that the drivers knew they were not supposed to be on duty for more than 14 hours a day and if they knew they would not be able to finish a route, they were to call in so that he or a route manager could make alternative arrangements. D & O at 16.

[33] § 31105(a)(1)(B)(i), *Gilbert*, ARB No. 11-019, slip op. at 7 (noting that refusals do not need to be based on actual violations to be protected under STAA).

[34] *Trans Fleet Enters., Inc. v. Boone*, 987 F.2d 1000, 1004 (4th Cir. 1992).

> Thus, I find the most probative evidence as to Complainant's refusal to complete his route on 23 Jul 14 to be the actual conversation between Complainant and his manager, which Complainant secretly recorded for what he apparently anticipated would be his legal case against Respondent. Complainant's manager told Complainant that after the DOT medical examination, Complainant was to come back and finish the route. When Complainant asked if the manager understood how many miles that was, the manager amended the order to finish the route to "do what you can do on the route." When Complainant said that would be five or six stops, his manager said "whatever it is." The evidence shows that it is more likely than not that on 23 Jul 14, Complainant's instructions were to get his DOT physical and then finish as much of the route as he could without violating the maximum hours.
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> Complainant testified at hearing that he could have continued driving for another hour and a half and complete maybe one more stop, but would have been pushing the maximum hours. His manager testified that Complainant could have definitely completed more stops and still stayed within the 14-hours. Some of the most probative evidence on this point comes from Complainant's covert recording. Complainant complained that routes lasting 11, 12 or 13 are not getting done early and he wanted to start getting done early. He was tired of working 12 hour days and only getting paid for 8. That, particularly when combined with his previous refusals to come back to resume his route after a doctor's appointment significantly impeaches his hearing testimony, which in itself was equivocal as to whether he could have completed more deliveries before exceeding 14 hours.[35]

As noted, the ALJ stated that Mauldin was "inclined to overstate time" to "establish a potential hours-of-service violation" because he felt he "was being cheated every time he exceeded eight hours in a day or forty hours in a week." The record evidence supports the ALJ's conclusion that Mauldin's complaints about not getting done early and not being paid for 11 to 13-hour days "significantly impeache[d] his hearing testimony" that had he completed more stops, he would have exceeded the 14-hour limit. Accordingly, Mauldin failed to demonstrate a reasonable belief that he would have exceeded the 14-hour hour-of-service restriction had he completed more of his route. Additionally, the ALJ found that Mauldin's July 23, 2014 dispatch did not contemplate a violation of the hours-of-service regulation. Because we find that substantial evidence on the record as a whole supports the ALJ's evidentiary findings and conclusion that Mauldin did not engage in protected activity, we affirm that conclusion.

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35 D & O at 28.

CONCLUSION

For the above reasons, the ARB affirms the ALJ's decision that Mauldin failed to establish that he engaged in activity protected under the STAA. Accordingly, we **AFFIRM** the ALJ's dismissal of Mauldin's complaint.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge