



In the Matter of:

RICKEY C. NEWELL,

ARB CASE NO. 2018-0062

COMPLAINANT,

ALJ CASE NO. 2015-STA-00006

v.

DATE: NOV 21 2019

AIRGAS, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Rickey C. Newell; *pro se*; West Monroe, Louisiana

For the Respondent:

Katherine E. Flanagan, Esq. and Amanda Wingfield Goldman, Esq.;
Little Mendelson, P.C.; Houston, Texas

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie,
Administrative Appeals Judges

FINAL DECISION AND ORDER

PER CURIAM. Rickey C. Newell, the Complainant, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on June 4, 2014, against Airgas, Inc., the Respondent. Complainant alleged that Respondent, his employer, had violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated his employment. 49 U.S.C. § 31105 (2007), as implemented at 29 C.F.R. Part 1978 (2019). Complainant argued that he was fired because he engaged in activity protected by the STAA. The STAA

prohibits employers from discriminating against employees when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules. 49 U.S.C. § 31105(a).

A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) on Remand¹ concluding that Complainant failed to prove by a preponderance of the evidence that any protected activity contributed to the termination decision because he found that the decision-makers did not know that Complainant had engaged in protected activity and concluded that Complainant was fired for knowingly violating hours of service rules. We summarily affirm the ALJ's decision.

BACKGROUND

Complainant worked for Respondent as a truck driver from October 2011, until he was fired on March 28, 2014. *Newell v. Airgas, Inc.*, ALJ No. 2015-STA-00006, slip op. at 2 (ALJ Oct. 2, 2015) ("D. & O. I"). On several occasions in the past during his employment, Complainant voiced objections to being assigned loads in violation of hours of service rules.² His supervisors on those occasions had told him that if he did not take the loads, he would be fired.³ *Newell v. Airgas, Inc.*, ALJ No. 2015-STA-00006, slip op. at 11 ("D. & O. on Remand") (ALJ Aug. 8, 2018).

On October 25, 2013, and March 21, 2014, J.T. Ary, who had no formal management training regarding hours of service rules, was Complainant's supervisor. D. & O. on Remand at 11. On these two days, Respondent asked Complainant to take loads that Complainant correctly believed would violate hours of service. *Id.* Complainant discussed the loads with Ary, but did not communicate

¹ The ALJ issued an earlier Decision and Order on October 2, 2015, which the Board remanded on January 10, 2018 (ARB No. 16-0007).

² Federal regulations define hours of service limits for drivers as set forth by the ALJ in his first decision. D. & O. I at 5-6. Generally, the rules limit how much work or on-duty time a driver may have within different spans of time. The rules also contain recordkeeping requirements.

³ We do not condone poor training of supervisors or management ignorance of rules which exist to promote safety on the public highways. Likewise we do not and would not excuse an employer's direction to an employee to continue to drive in violation of those rules. It appears that these facts are established in the record and we note their existence with disapproval.

any concerns about hours of service violations to him and Ary had no reason to infer from anything Complainant said that Complainant was raising hours of service violations. *Id.* at 6, 12. Ary did not know the hours of service rules and did not understand that Complainant would violate them by taking loads on these days. *Id.* at 6, 8, 11. Complainant took the loads and violated the rules. *Id.* at 12.

On March 24, 2014, Ary called Susan Durbin, a manager, to ask how to record Complainant's hours for March 21, because they extended from a Friday onto a Saturday. *Id.* at 10, 12. Durbin immediately understood that the trip violated the hours of service rules. *Id.* at 12. Durbin told Ary to shut down truck operations, called Respondent's vice president, Mike Thomas, and explained to him that an hours of service violation had occurred. *Id.* Thomas told Durbin to wait while he consulted with safety director, Ryan Bobsein, and with Ary. *Id.* At some point thereafter, Durbin conducted hours of service training for Ary. *Id.* The safety staff reviewed the paperwork regarding Complainant's March 21-22, 2014 trip. *Id.*

On March 28, 2014, Respondent held a conference call about the March 21-22, 2014 hours of service violation with Complainant that included Thomas, Respondent's Account Manager, Joe Walker, both members of Respondent's safety staff, and Human Resources Director, Tom Sprunger. *Id.* Durbin observed the call. *Id.* Complainant was asked why he took the load that caused him to violate the rules and he said that he was "simply doing what he had been told to do by his bosses since starting out with Mike Pate." *Id.* Thomas was not surprised to hear that Pate, whom he had fired, had required Complainant to violate the rules. *Id.* Complainant did not tell Thomas that he ever objected to taking loads that violated hours of service rules. *Id.*

After the conference call, Thomas, Bobsein, and Sprunger discussed the situation and decided to fire Complainant for violating the hours of service rules. *Id.* They understood that Complainant had been directed to violate hours of service by supervisors but did not know that he had ever objected about being told to do so. *Id.* They understood that on March 21, 2014, Ary sent Complainant on a trip which would violate the rules. *Id.* They also understood that while Ary did not know that there would be a rule violation, Complainant did, and Complainant took the trip anyway. *Id.*

The ALJ found Durbin to be the most credible witness in the case with testimony that was internally consistent and straightforward. *Id.* at 13. He also credited Ary's testimony as consistent with that of Durbin and Complainant on key

issues including that Complainant never objected to the March 21, 2014 route and the substance of conference call. *Id.*

Having considered the evidence of contributing factor as a whole and collectively weighing all of the evidence of record the ALJ found that none of Complainant's protected activity contributed to his termination. *Id.* at 15. The ALJ further found that none of the decision-makers to the termination decision had any knowledge about Complainant's protected complaints or any complaints Complainant may have made (but which the ALJ found he did not make) on October 25, 2013, or March 21-22, 2014. *Id.* at 15. The ALJ found that Respondent fired Complainant for knowingly violating rules designed to protect public safety on March 21-22, 2014. *Id.* at 16.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to hear appeals from ALJ decisions and issue final agency decisions in cases arising under the STAA. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019). The Administrative Review Board (ARB or the Board) reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted). The evidence will be sufficient if it is "more than a mere scintilla," *see Biestek v. Berryhill*, 587 U.S. ____ (2019) (slip op. at 5) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)), and need not amount to a preponderance. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008). "It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Biestek*, 587 U.S. ____, slip op. at 5 (quoting *Consolidated Edison*, 305 U.S. at 229). We uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." *Jacobs*, ARB No. 2017-0080, slip op. at 2 (quotations omitted).

DISCUSSION

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). 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121 (2000). To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii). In light of our disposition of this matter, we limit our discussion to the issue of whether the ALJ correctly decided that protected activity did not contribute to the termination decision in this matter.

In deciding this case, the ALJ concluded that while Complainant had engaged in protected activities on several occasions and was fired for knowingly violating the hours of service rules, there was no contributing factor causation because none of the decision-makers knew that Complainant had ever objected to violating hours of service rules. Witness testimony, including Complainant's own testimony that he knew that he was driving in violation of the hours of service rules and did not object to the violations on October 25, 2013, or March 21-22, 2014, supports the ALJ's findings and conclusions. Substantial evidence supports the ALJ's findings of fact and his conclusions are in accordance with law.

For these reasons, we must affirm based on the mandated standard of review. What Complainant is asking us to do is to reweigh the evidence in his favor, a task that we cannot do. We will uphold an ALJ's factual finding that is supported by substantial evidence even if there is substantial evidence for the other party, and even where we "would justifiably have made a different choice had the matter been before us *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

CONCLUSION

As substantial evidence supports the ALJ's factual determination that Respondent did not take any adverse action against Complainant because he had engaged in protected activity, we **AFFIRM** the ALJ's conclusion of law that Respondent did not violate the STAA. Accordingly, the complaint in this matter is **DENIED**.

SO ORDERED.