

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



In the Matter of:

RODERICK A. CARTER,

ARB CASE NO. 2018-0078

COMPLAINANT,

ALJ CASE NO. 2012-STA-00061

v.

DATE: SEP 26 2019

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

RESPONDENTS.

Appearances:

For the Complainant:

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

For the Respondents:

**Michael F. Harris, Esq.; *Harris, Dowell, Fisher & Young, L.C.*,
Chesterfield, Missouri**

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

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended.¹ Complainant

¹ 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2018)(implementing the STAA).

Roderick A. Carter filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondents CPC Logistics, Inc., CPC Medical Products, LLC (collectively CPC) and Hospira Fleet Services, LLC (Hospira) violated the STAA by discharging him from employment. OSHA denied the complaint and Carter requested a hearing before an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the complaint on the grounds that Carter failed to prove that his STAA-protected activity was a contributing factor in his discharge. Carter appealed to the Administrative Review Board (Board) and we affirmed the ALJ's dismissal of Carter's complaint. Carter then appealed our ruling to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit determined that the ALJ overlooked evidence indicating that Carter had reported his need to take breaks from driving to CPC Supervisors and that this oversight may have adversely affected the outcome of this case.² The court remanded the case to the Board, and the Board remanded the case to the ALJ. On August 8, 2018, the ALJ issued a Decision and Order on Remand (D. & O. on Rem.), again denying the complaint, and Carter appealed the ALJ's decision to the Board. For the following reasons, we affirm the ALJ's D. & O. on Remand.

BACKGROUND³

CPC hired Carter on February 27, 2007, as a tractor-trailer driver for a six-man relay crew based in Columbia, South Carolina. The crew transported shipping containers loaded with medical equipment from Rocky Mount, North Carolina, to Jacksonville, Florida, and back again to Rocky Mount. An hour before the end of a 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

² *Carter v. CPC Logistics, Inc; CPC Medical Products, LLC; Hospira Fleet Services, LLC; Department of Labor, Administrative Review Board*, 706 Fed. Appx. 794, 797 (4th Cir. 2017).

³ On remand and as appealed to the Board, the facts of this case remain largely the same. With the exception of the findings vacated after remand, the ALJ affirmed the findings of fact in his first Decision and Order and incorporated those findings into his Decision and Order on Remand. See D. & O. on Rem. at 2, 5 ("In light of the Fourth Circuit's opinion, I vacate my previous findings (1) that Mr. Carter never mentioned fatigue breaks to his supervisors and (2) that Mr. Carter's rest breaks were not a factor in the decision to terminate ... After re-reviewing all of the evidence in the administrative file, I affirm my other findings of fact in the Decision and Order, and they are incorporated herein.").

leg. The goal was maintaining a synchronized schedule to keep Hospira's Rocky Mount facility operational.⁴ CPC drivers were required to call in if they experienced significant delays, and Carter was aware of this policy.⁵

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.⁶ CPC issued Carter more warning letters over the next two years, including a five-day suspension in August 2010 when a CPC audit revealed numerous discrepancies between the time entries in Carter's hours-of-service logs and the time he recorded on trip reports he submitted to payroll.⁷

In 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. Gordon repeatedly complained to Ron Covert, CPC's Regional Manager, about Carter's excessive delays and lateness reporting to work. Covert kept a list of the delays reported by Gordon between June 27 and September 28, 2011. This list showed that Carter was taking up to 14 hours to make the same drive that had taken Gordon 11 to 12 hours. The excessive hours delayed Gordon's daily 4:00 p.m. start time by 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.⁸

⁴ Transcript (Tr.) 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.

⁵ Respondent's Exhibits (RX) 1-3. *See also* RX 6 and 8 (informing Carter that he had failed to follow proper call-in procedures).

⁶ D, & O. at 29-30 (describing disciplinary warnings and suspensions Carter received for violations of law and of CPC policies).

⁷ RX 13.

⁸ RX 35; Tr. 190. 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.

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 that conversation Carter had "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 gonna take my breaks and take my time coming back."⁹ 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."¹⁰

Gordon complained further in September 2011 that Carter was "taking over an hour in breaks on the way down and the same on the way back" and he asked Covert to "[p]lease intervene."¹¹ Covert reviewed Carter's logs and found prolonged periods when Carter was on duty but not driving. Covert asked Carter why he used so much time not driving and, according to Covert, Carter responded that he probably had to go to the bathroom or maybe he had not been feeling well.¹² Covert then prepared a recap of Carter's hours and forwarded it to Pruitt, who was in charge of about 600 CPC drivers.¹³

During his employment with CPC, Carter occasionally informed his supervisors that he was taking breaks from driving. Carter testified at the hearing that he told Covert, Pruitt, and a dispatcher that his extended run times were caused by rest breaks or fatigue breaks.¹⁴ On July 15, 2011, in an e-mail exchange between Covert and a CPC dispatch supervisor, Covert told the dispatcher that Carter reported that he had been delayed because he wasn't feeling well and was entitled to a break.¹⁵

⁹ RX 26.

¹⁰ *Id.*

¹¹ *Id.*

¹² Tr. 208.

¹³ 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. 195, 201.

¹⁴ Tr. 30-33.

¹⁵ RX 25.

CPC's submission to OSHA in response to Carter's complaint indicates that he mentioned fatigue breaks to two supervisors when questioned about his performance and claimed that he often got sleepy while performing his driving duties.¹⁶ Carter had also asked Pruitt in a phone conversation if he could stop driving if he was sleepy and told Pruitt that he was allowed by the DOT to take rest breaks if he needed them.¹⁷

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.¹⁸ After issuance of this letter, Carter's turnaround time got worse. One week before his discharge, Covert issued Carter a disciplinary letter regarding his failure to be available for work assignments.¹⁹

Pruitt compared Carter's manifest times with the logs of two other drivers on the Columbia team during July, August, and September 2011. Based on Carter's average times over those months, Pruitt recommended to his supervisor, Harold Wallis, Jr., vice president of CPC's eastern operations, that CPC fire Carter. Wallis reviewed Gordon's complaints about schedule delays and Carter's disciplinary history, particularly the warning letter concerning his falsification of his logs.²⁰

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. On October 5, 2011, CPC issued Carter a letter terminating his 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

¹⁶ Complainant's Exhibit (CX) 3 at 8.

¹⁷ *Id.*

¹⁸ RX 28.

¹⁹ RX 31.

²⁰ Tr. 249-251.

within the past 30 months for which he was disciplined, which showed “a complete disregard for improvement.”²¹

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to issue final agency decisions in review or on appeal of matters arising under the STAA.²² 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.²³ We uphold an ALJ’s credibility findings unless they are “inherently incredible or patently unreasonable.”²⁴

DISCUSSION

The STAA provides that a person may not “discharge,” “discipline,” or “discriminate” against an employee “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activities.²⁵ 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.²⁶ 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

²¹ RX 36.

²² Secretary’s Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 1978.110(a).

²³ 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).

²⁴ *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)).

²⁵ 49 U.S.C. § 31105(a)(1).

²⁶ 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121.

action.²⁷ Failure to establish any one of these elements requires denial of the complaint.²⁸

The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety or security regulation, standard or order.” *Id.* In addition, it is a STAA violation for any person to retaliate against a driver who refuses to operate a commercial motor vehicle when the driver’s ability or alertness is impaired due to fatigue, illness, or other cause.²⁹

Carter engaged in STAA-protected activity and CPC subjected him to an adverse employment action by discharging him from employment. The issue before us on appeal is to determine if, after his reconsideration of the evidence, the ALJ’s reiteration of his conclusion that Carter’s protected activity did not contribute to his discharge is supported by the record.

On remand the ALJ reconsidered his rulings on Carter’s asserted justifications for his delayed deliveries. The ALJ affirmed his ruling that Carter engaged in STAA-protected activity on July 15, 2011, when he refused to drive due to illness. The ALJ vacated his previous findings that Carter never mentioned fatigue breaks to his supervisors and instead found that “Carter told Mr. Covert and Mr. Pruitt that his extended run times were caused by rest breaks.”³⁰ And the ALJ acknowledged CPC’s statement to OSHA, which contains several statements admitting that Carter informed CPC of his right to refuse to drive if his alertness was impaired.³¹

²⁷ 49 U.S.C. § 42121(b)(2)(B)(iii).

²⁸ *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).

²⁹ 49 U.S.C. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(a), (c)(1)(i).

³⁰ D. & O. on Rem. at 3. While CPC had no rule that drivers were required to contact the company every time they took a rest break, company rules did require drivers to report significant delays. *Id.* at 5.

³¹ See CX 3 at 8, 13-14 (“Mr. Carter told Mr. Covert that he ran late because he got sleepy and had to pull over to rest ... Mr. Carter asked CPC Division Manager Ken Pruitt over the phone whether Mr. Pruitt was saying he couldn’t stop if he was sleepy ... Mr. Carter said that he was allowed by the DOT to take rest breaks if he needed them ... Mr. Carter also accused CPC of not caring about safety and threatened to report CPC ... Thus, CPC knew Mr. Carter had verbally claimed that he often got sleepy while performing his

The Fourth Circuit identified CPC's position statement to OSHA as containing evidence concerning conversations that the ALJ may have overlooked in his first decision.³² The ALJ on remand discussed two conversations that Carter had with supervisors and found that Carter's additional statements to CPC to the effect that his delays were a result of fatigue breaks were untruthful for several reasons. D. & O. on Rem. at 3. First, the ALJ found it unbelievable that Carter suffered fatigue on nearly every run he made. Second, the ALJ found that Carter delayed his runs to annoy and harass his partner and disrupt his partner's schedule. D. & O. on Rem. at 3-4. Third, the ALJ found that Carter's untruthfulness was further evidenced by the fact that he admitted that he never recorded his rest breaks on his trip manifests despite his obligation to do so.³³ With the exception of July 15, 2011, Carter failed to inform CPC contemporaneously with any bouts of fatigue or illness.³⁴ We affirm the ALJ's findings that Carter's claim of having made additional statements concerning fatigue to CPC were not credible. We therefore affirm the ALJ's ruling that the only recorded incident of STAA-protected activity in this case occurred on July 15, 2011.³⁵

After his review of the evidence, the ALJ again concluded that Carter failed to prove by a preponderance of the evidence that his STAA-protected activity was a contributing factor in CPC's decision to discharge him, and we agree. The ALJ again

driving duties and therefore needed frequent rest breaks, and that Mr. Carter had referred to the DOT when stating he was entitled to such breaks.”).

³² The Fourth Circuit did not identify specifically the evidence that the ALJ overlooked beyond a description of the conversations and that at least one of the conversations was referenced in CPC's statement to OSHA.

³³ Tr. 65 (“I never, even when I was doing the other leg, for four and a half years of being there, I never put down that I stopped and took a rest break.”).

³⁴ See D. & O. on Rem. at 5 (“Mr. Carter may have told his supervisors that his long run times were caused by fatigue breaks, see CX 3, but Mr. Carter did not make those statements while he was suffering from a bout of fatigue. Because the statements were not made contemporaneous with any bout of fatigue, and I find Mr. Carter to be generally non-credible, I find those statements were merely post hoc excuses and give them no probative weight.”).

³⁵ In his Petition for Review Carter asserts that, in addition to July 15, 2011, he engaged in STAA-protected activity on September 9, and October 4, 2011. Petition for Review at 8. However, he did not indicate what he did or said on those days that would constitute protected activity. We note that we issued a briefing order after receipt of Carter's Petition for Review but he did not file a brief identifying record evidence supporting this assertion.

found that Carter was delayed by more than an hour on nearly all of his runs for three months prior to his discharge. The D. & O. included several charts summarizing the start and end times for each run by Carter and Gordon during the period from June 27, 2011, through October 5, 2011, and summarizing the times it took Carter to complete round trips compared to the times it took similarly situated drivers to complete similar trips on the same days.³⁶ The ALJ reexamined this evidence on remand:

There were 44 days on which Mr. Carter and the team 1 driver drove the Jacksonville route. Decision and Order at 38. On 39 of those days, the team 1 driver made the run in less time than Mr. Carter did, averaging about 67 minutes less than it took Mr. Carter. *Id.* On each of the five days on which Mr. Carter took less time than the team 1 driver did, the team 1 driver was delayed in Jacksonville for one to three hours. *Id.* at 38-39. And, there were 44 days on which Mr. Carter and the team 2 driver (Walter Moore) drove the Jacksonville route. *Id.* at 39. On 38 of those days, Mr. Moore completed the trip in an average of 111 minutes less time than it took Mr. Carter. *Id.* On the other six days, Mr. Moore took longer than Mr. Carter, but Mr. Moore was waiting for the train at the Jacksonville railyard on each of those days. *Id.*³⁷

CPC's admission that Carter's breaks from driving were a factor in the decision to fire him does not establish that CPC violated the STAA because, with one exception, Carter failed to prove that those breaks constituted STAA-protected activity. The evidence he offered in support of his alleged protected activity was not credible to the finder of fact. Instead, the overwhelming evidence shows that Covert reviewed Carter's job performance and Wallis made the decision to discharge Carter based on his disciplinary history, his failure to improve his performance, and his unexplained delays on the Jacksonville run. In sum, we agree with the ALJ's conclusion that CPC's termination of Carter's employment did not violate the STAA.³⁸

³⁶ D. & O. at 31-38.

³⁷ D. & O. on Rem. at 3.

³⁸ *Id.* at 7, citing *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 987-88 (4th Cir. 1993) ("An employer obviously remains free to sanction an employee for chronically tardy conduct

CONCLUSION

In accordance with the Fourth Circuit's ruling, we have examined the record to determine if Carter's STAA-protected activity was a contributing factor in his discharge from employment. The record fully supports the ALJ's conclusion that Carter engaged in STAA-protected activity by refusing to drive due to illness. The record also supports the ALJ's conclusion that Carter's protected activity did not contribute to his discharge. Carter was discharged because of his unexplained delays, disciplinary history, and failure to improve his performance. Accordingly, the ALJ's Decision and Order on Remand denying Carter's complaint is **AFFIRMED**, and the complaint is hereby **DENIED**.³⁹

SO ORDERED.

or indeed for any action not protected by the STAA. The STAA protects only a driver who may *unexpectedly* encounter fatigue on the course of a journey; it obviously does not protect delays unrelated to the statutory purposes of public and personal safety." (emphasis added)).

³⁹ 29 C.F.R. § 1978.110(e).