



**In the Matter of:**

**WILLIAM CLINT JOYNER,**  
**COMPLAINANT,**

**ARB CASE NO. 12-028**

**ALJ CASE NO. 2010-SWD-001**

**v.**

**DATE: April 25, 2014**

**GEORGIA-PACIFIC GYPSUM,**  
**LLC,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Kathleen M. Anderson, Esq.; *Barnes & Thornburg, LLP*; Fort Wayne, Indiana; and  
Joseph M. Murray, Jr.; *Constangy, Brooks & Smith, LLP*; Atlanta, Georgia**

***For the Respondent:***

**William G. Glass, Esq.; *Weiner, Shearhouse, Weitz, Greenberg & Shawe, LLC*;  
Savannah, Georgia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy  
Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals  
Judge***

**DECISION AND ORDER REVERSING ALJ'S LIABILITY DETERMINATION  
AND REMANDING FOR DETERMINATION OF RELIEF**

This case arises under the whistleblower protection provisions of the Solid Waste Disposal Act of 1976, 42 U.S.C.A. § 6971 (Thomson Reuters 2010) (SWDA or Act), and implementing regulations, 29 C.F.R. Part 24 (2013). William Joyner filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Georgia-Pacific Gypsum (Georgia-Pacific or Company), retaliated against him for reporting safety

violations. OSHA investigated and dismissed the complaint on February 18, 2010. Joyner objected and filed a hearing request with the Office of Administrative Law Judges.

On August 19, 2010, an Administrative Law Judge (ALJ) granted, in part, and denied, in part, Georgia-Pacific's motion for summary decision. The ALJ held an evidentiary hearing on November 8-10, 2010. On December 9, 2011, the ALJ issued a Decision and Order dismissing the complaint. Joyner petitioned the Administrative Review Board (ARB) for review. We reverse. We hold that the ALJ erred in determining that Georgia-Pacific did not violate the SWDA. Under the facts in this case, the Company's suspension and subsequent termination of Joyner violated the SWDA. We remand for a determination of relief.

## BACKGROUND

### A. *Factual Summary*

This case involves Georgia-Pacific's placement of off-spec product and reporting of that product pursuant to a consent order and compliance with state law. Georgia-Pacific manufactures gypsum wallboard products and has gypsum wallboard plants in North America, including Savannah, Georgia. *Joyner v. Georgia-Pacific Gypsum, LLC*, ALJ No. 2010-SWD-001), slip op. at 7 (Dec. 9, 2011) (D. & O.), citing Joint Exhibit (JX) 1, Hearing Transcript (Tr.) at 10 (Stipulations of Fact). Joyner has worked at Georgia-Pacific since 1998. In 2004, he began working at the Savannah Plant as Senior Regional Environmental Resource, where he was responsible for environmental management for the gypsum plant. D. & O. at 7, citing JX 1.

#### 1. *Placement of off-spec product*

Gypsum board manufactured at the Savannah Plant is used for many applications, including "covering interior walls to provide a visible 'finished' surface." D. & O. at 7. Gypsum board must meet certain specifications to be sold to customers, and product that does not meet specifications for customer sale is considered "off-spec." *Id.* "Off-spec product that cannot be sold but is structurally sound is sometimes designated as 'riser food.'" *Id.* "Using structurally sound off-spec gypsum board for risers is a standard practice in the industry." *Id.* Riser boards are sections of out-of-spec boards glued together and used as spacers in the stacking and transportation of finished wallboards. *Id.* at 13.

In 2008, Georgia-Pacific changed the location of its riser food storage at the Savannah Plant. Riser food had been stored inside the plant for future use in riser boards. When Georgia Pacific began producing fiberglass-matted wallboard, the plant lacked sufficient indoor plant space, and in March 2008 Company Plant Manager David Neal authorized stacking riser food outside the plant. D. & O. at 7, 24, 79; see also Tr. at 99 (Joyner). Riser food stored outside was required to be in plastic bags to prevent damage. D. & O. at 83. Any damaged riser food was culled to the waste pile. *Id.* at 75.

**2. Georgia Pacific's 2006 Consent Order with State of Georgia Department of Natural Resources, Environmental Protection Division**

Georgia state law provides for the management of solid waste and regulates the disposal and handling of solid waste materials. See Ga. Code 391-3-4-.04. The state law excludes from regulation certain recovered waste materials under a provision referred to as the "60/90 Rule."<sup>1</sup> In August 2006, the Environmental Protection Division for the State of Georgia, Department of Natural Resources, inspected the Savannah Plant and documented a stockpile of paper-faced wallboard rejected materials. Complainant's Exhibit (CX 1) at 2 (Consent Order at 2). "Records reviewed during the inspection indicated that the stockpile was not compliant with Georgia Rule 391-3-4-.04(7), and was not excluded from regulation as solid waste." *Id.* Following a meeting of the parties on August 23, 2006, the Division proposed a corrective action based on an alleged violation that Georgia-Pacific had accumulated wallboard reject material speculatively and operated a solid waste handling facility without obtaining a permit for such activity in violation of Georgia Rule 391-3-4-.02(1) (Solid Waste Handling Permits). CX 1 at 3.

On November 21, 2006, the State and Georgia-Pacific entered into a Consent Order to remedy the alleged violation, and required compliance with the 60/90 Rule set out at Ga. Code

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<sup>1</sup> See Ga. Code 391-3-4. Solid Waste Management

391-3-4-.04. General \* \* \*

(7) Recovered Materials:

(a) Recovered materials and recovered materials processing facilities are excluded from regulation as solid wastes and solid waste handling facilities. To be considered exempt from regulation, the material must have a known use, reuse, or recycling potential; must be feasibly used, reused, or recycled; and must have been diverted or removed from the solid waste stream for sale, use, reuse, or recycling, whether or not requiring subsequent separation and processing.

(b) Materials accumulated speculatively are solid waste and must comply with all applicable provisions of these regulations.

(c) A recovered material is not accumulated speculatively if the person accumulating it can show that there is a known use, reuse, or recycling potential for the material, that the material can be feasibly sold, used, reused or recycled and that during the preceding 90 days the amount of material that is recycled, sold, used or reused equals at least 60 percent by weight or volume of the material received during that 90-day period and 60 percent by weight or volume of all material previously received and not recycled, sold, used, or reused and carried forward into that 90-day period.

391-3-4-.04(7)(c).<sup>2</sup> CX 1; see also D. & O. at 65. Georgia-Pacific paid a settlement in the amount of \$10,000. CX 1 at 3. The 2006 Consent Order required the company's Savannah Plant to reduce the volume of reject material in existing stockpiles and stockpile generated during the term of the Consent Order by specified percentage amounts from 2006 to 2010. D. & O. at 65; see also CX 1 at 3-5. Georgia-Pacific's compliance with the Consent Order was subject to periodic baseline surveys of the reject material stockpiles conducted by a licensed third-party to

<sup>2</sup> The 2006 Consent Order required the following remedial action:

(1) No later than October 30, 2006, the Respondent shall submit to the Division a third party site survey, performed and certified by a licensed land surveyor, that establishes a baseline volume of all wallboard rejected material stockpile(s), including paper-faced and glass mat material, at the Facility. The volume shall be reported in units of cubic yards.

(2) The Respondent shall reduce the volume of wallboard reject material, either by recycling or disposal in a permitted landfill, according to the following schedule. The third party site surveys shall be performed and certified by a licensed land surveyor and shall be conducted on the dates specified below. The volume determinations shall include existing stockpiles and stockpiles generated during the term of this Order. Volume reduction shall be calculated using the site surveys listed below and the baseline volume determined in accordance with [the condition].

Date of Survey	Volume Reduction Milestone
Dec. 30, 2006	1%
June 30, 2007	2%
Dec. 30, 2007	5%
June 30, 2008	10%
Dec. 30, 2008	25%
June 30, 2009	50%
Dec. 30, 2009	75%
June 30, 2010	95%
August 3, 2010	100%

(3) The Respondent shall submit the third party site surveys to the Division within 30 days of completion of each survey. The submittals shall contain all calculations for determining volume reduction milestones and shall include a certification statement, signed by the Plant Manager of the Facility, stating that the Respondent is compliant with the conditions of this Order.

CX 1 at 3-5; see also D. & O. at 65-66.

determine whether volume reduction milestones were met, and the Plant Manager's certification of compliance. D. & O. at 65-66.

### ***3. Events leading to Joyner's employment termination***

Joyner has held numerous positions at various plants with the company since 1988, and around 2004 or 2005 he transferred to the Savannah Plant as the Senior Regional Environmental Resource where he was responsible for the Plant's environmental management. D. & O. at 7-8. In 2008, Joyner served as compliance officer for safety and environmental matters under the immediate supervision of Savannah Plant Manager David Neal. *Id.* at 7, citing Joint Exhibit (JX) 1, Tr. at 10; D. & O. at 13. Joyner reported directly to Plant Manager Neal, with "dotted-line" reporting to Ken Blankenship, the Business Unit Environmental Manager based in Atlanta. D. & O. at 7, citing JX 1. Joyner's responsibilities included monitoring the company's compliance with solid waste regulations and the 2006 Consent Order, and "notify[ing] his superiors of corrective actions needed and with recommendations on how to correct deficiencies." D. & O. at 75.

#### ***a. June 2008 Consent Order Compliance Survey***

As previously noted, in March 2008 Plant Manager Neal authorized Savannah Plant workers to stack riser food outside the facility because of insufficient space indoors. D. & O. at 24, 79. In April 2008, David Lyle, inspector with the Georgia Environmental Protection Division (EPD) (State Inspector Lyle), evaluated the Savannah Plant. During his inspection, Lyle informed Joyner that riser material stockpiled outside the plant was subject to the 60/90 rule, and if not used in accordance with the rule would have to be included in the consent order survey. D. & O. at 14, 20, 31; Tr. at 280 (Joyner); Tr. at 307-308 (Lyle). Joyner took State Inspector Lyle to Plant Manager Neal's office where Lyle similarly advised Neal that the outside stockpile of riser food was subject to the 60/90 Rule and should be included in the survey. Tr. at 307-308 (Lyle); Tr. at 103, 266 280 (Joyner). In Joyner's presence, Neal voiced his disagreement and stated his belief that the stacked riser food was product and did not fall within the scope of the 60/90 Rule. D. & O. at 31, 48, 53, 55; Tr. at 103, 266, 280 (Joyner); Tr. at 307-308 (Lyle). Later Neal raised the issue with Business Unit Manager Ken Blankenship and an attorney in Georgia-Pacific's legal department. In a conference call that included Joyner, the Company's attorney advised that the stored riser food was not subject to either the 60/90 rule or the consent order. D. & O. at 51-53, 58.

Following the conference call by Neal with Blankenship, Joyner, and the company's legal department, Georgia-Pacific determined that riser food was not subject to the 60/90 Rule or the Consent Order. D. & O. at 51, 58; Tr. at 435, 457-458 (Blankenship); Tr. at 511-512 (Neal). In May 2008, Blankenship informed Joyner about the Company's position that the 60/90 Rule did not apply to riser food and that riser food was not subject to the periodic compliance surveys required by the Consent Order. D. & O. at 39-40, 42-43. Joyner nevertheless repeated his riser food concern to Neal in early June, and Neal repeated to Joyner the Company's position that the

outside riser food did not fall within the scope of the 60-90 Rule and would not be counted in the upcoming June 2008 compliance survey. D. & O. at 21, 24, 25; Tr. at 109, 283 (Joyner).

On July 2, 2008, Plant Manager Neal advised Joyner that he was considering putting Joyner on a Performance Improvement Plan (PIP)<sup>3</sup> to address perceived deficiencies in professional behavior and communication abilities unrelated to the riser food storage issue. D. & O. at 15, 28, 50; see also Tr. at 124 (Joyner). *But see* D. & O. at 40 (ALJ notes Blankenship's testimony that Joyner "met or exceeded expectations, was an A player deserving of a merit increase, and strived to achieve GP guidance principal of 10,000 percent compliance."). That same day, Joyner received the results of the June 2008 compliance survey, which he immediately forwarded to Blankenship with the comment: "We met the June 30th consent order milestone." D. & O. at 7, 39, 97; Respondent Exhibit (RX) 20; CX 11. Joyner did not mention to Blankenship his ongoing concern that riser food was not counted in the survey, and he testified that despite the survey findings he did not make any calculations or engage in recordkeeping to apply the 60/90 Rule. Tr. at 226, 230, 269-70, 277, 286 (Joyner). On July 7, 2008, Joyner submitted a draft compliance certification letter to Neal and Blankenship for their review. D. & O. at 15; Tr. at 66-67 (Joyner) (testifying about draft certification letter). The certification did not raise the riser food issue. D. & O. at 15. Joyner testified that he did not raise any concerns about the stockpiled riser food not being part of the June 30, 2008 survey. Tr. at 121 (Joyner). He stated:

I didn't think that would be a good career move because David Neal has already told me he disagrees with me. Ken Blankenship has already told me not to raise the issue anymore. I felt like I would be putting my job in jeopardy if I were to write a letter that said we were out of compliance when my direct supervisors told me to write the letter based on what the survey said.

D. & O. at 15-16, quoting Tr. at 127 (Joyner).

***b. Joyner's July 2008 Guideline Complaint to Georgia-Pacific***

On July 7, 2008, the same day that he submitted the draft certification letter to Neal and Blankenship for review, Joyner verbally complained to Georgia-Pacific's "Guideline" telephone hotline,<sup>4</sup> and alleged numerous violations of federal law. D. & O. at 16, 22; see also RX-13.

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<sup>3</sup> The evidence reflects that the purpose of the Company PIP, which in Joyner's case was never implemented, is "to document deficiencies in performance and as a communications tool to provide the individual whose performance is not meeting expectations, specific examples of where their performance is failing and to give them examples of what types of behaviors are expected and a time line in which those expectations are to be met." D. & O. at 50; RX 21; Tr. at 506-507 (Neal). Company PIPs "usually provide for a period for the employee to improve or face termination." D. & O. at 47.

<sup>4</sup> Under procedures established as part of Georgia-Pacific's Code of Conduct program (see discussion, *supra*), Guideline Complaints are "received by an external, non-[Georgia-Pacific] vendor,

Among other things, Joyner alleged that Neal failed to count riser food in the survey as required by the 2006 Consent Order and the 60/90 Rule set out in Ga. Code 391-3-4-.04(7)(c). D. & O. at 22; see also Tr. at 133 (Joyner). At the same time, Joyner supplemented his verbal hotline complaint with the submission of a written “Guideline Letter” complaint under Georgia-Pacific’s Code of Conduct program. D. & O. at 8-9, 62-63, 77. Joyner’s written complaint, captioned “Consent Order Potential Falsification of Record,” alleged that certain materials at the Savannah Plant were not being counted in official surveys in an effort to ensure that Georgia-Pacific would meet the reduction requirements set forth in the Consent Order. More specifically, Joyner’s complaint stated in relevant part:

The Plant Manager allows reject boards to be stacked inside the plant instead of being stacked in the reclaim pile. This is being allowed to make sure that the board is not being counted in the official surveys and to ensure that the plant meets the pile size reduction milestones listed in the consent order. The facility also keeps a large stack of unusable board outside on the pavement. This board is classified as ‘riser food’ but in fact has not been used for riser food. The Georgia EPD 60/90 rule applies to the board pile, but the Plant Manager allows surveyors to leave this board out of the official survey report. The EPD inspector even commented to me during an inspection that he believes the ‘riser food’ stacked outside and not used according to the 60/90 rule would be subject to the stipulations in the consent order. I’ve reported this to the Plant Manager and the Division Environmental Manager. I was again reminded that my approach and communications skill needed work, that everything is not “black and white” and that I was on a developmental plan.

CX-13 at 10; RX 29; see also D. & O. at 62-63.

Bridgett Hawkins, Georgia-Pacific’s Manager of Affirmative Action and Compliance (Compliance Manager Hawkins) contacted Joyner shortly after he submitted his written Guideline Complaint. She informed him that she and an outside attorney, Benjamin Briggs, had been assigned to investigate the Complaint. D. & O. at 28, 45. See also D. & O. at 86. On or about July 15, 2008, Joyner contacted Compliance Manager Hawkins for guidance about submitting the required compliance certification in light of the investigation. D. & O. at 28, 45, 47. Hawkins advised Joyner to continue what he was doing pending her investigation, “to just proceed with . . . the normal process.” D. & O. at 20, 21, 47. Joyner also informed Margaret Vest, a Regional Environmental Engineer for Georgia-Pacific, about his concerns. She advised Joyner to follow Hawkins’ directions. D. & O. at 16.

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[and] the intake information is forwarded to [Georgia-Pacific’s] compliance and ethics department for determination of which relevant department should handle the Complaint based on the matters involved.” D. & O. 46; see also D. & O. at 8.

On July 15, Joyner provided Plant Manager Neal with a final letter for his signature and submission to the State of Georgia Department of Natural Resources, Environmental Protection Division, certifying the Savannah Plant's compliance with the 2006 Consent Order. D. & O. at 9; CX 14. The document did not address any dispute concerning the scope of the 60/90 Rule to the company's riser food. *Id.* Neal signed the compliance certification letter later that day, and it was mailed to the Environmental Protection Division. CX 15; see also D. & O. at 66-67. On July 28, 2008, Joyner sent an e-mail to Compliance Manager Hawkins stating, in part, that he believed the Company was taking action to cover up its failure to account for the riser food stockpile in the June 30, 2008 compliance survey. D. & O. at 63; CX 19. Joyner sent a similar e-mail to Hawkins on July 30. D. & O. at 63; CX 20.

On August 1, 2008, Robert Wolfe, Director of Human Resources for Georgia-Pacific, notified Joyner that he was being placed on "suspend with pay" status for authoring the July 15, 2008, certification compliance letter due to concerns that the letter contained false information. D. & O. at 32-33, citing Tr. at 326-345 (Wolfe). Wolfe testified that his decision to suspend Joyner was based on information the Company's in-house legal counsel had received from Benjamin Briggs, an outside counsel retained to assist and ultimately complete the investigation of Joyner's Guideline Complaint. D. & O. at 33, 46-47, 70-71. Reacting to his suspension, Joyner e-mailed Hawkins (with copies to Wolfe and the Company's legal department) on August 1, 2008, restating the allegations contained in his July 7 Guideline Complaint that stockpiles of riser material had been purposefully omitted from the June 2008 compliance survey. D. & O. at 64; CX 22.

On August 3, 2008, Joyner e-mailed State Inspector Lyle, and reported his concerns that the riser food had not been reused or recycled in accordance with the 60/90 Rule and had not been included in the June 30, 2008, survey. D. & O. at 64; CX 24. Joyner stated in his e-mail to Lyle: "It's my opinion, based on my reading of the consent order and based on your comments during your last inspection that the survey of June 30th, 2008 is not representative of 'all reject gypsum stockpiles' as required by the Consent Order. I have made all attempts internally to GP to get this issue resolved but to no avail." CX 24. Joyner informed Lyle that he had reported the discrepancy to Georgia-Pacific's compliance hotline on July 7, 2008, and that as of August 1, 2008, he had been suspended from his job pending the completion of an internal investigation. Joyner reported the matter to Lyle because Joyner had been "unable to get resolution internally." *Id.* On August 4, Joyner met with Lyle to discuss in person the concerns he had raised in his e-mail of the previous day. D. & O. at 31, 76, 91.

In an August 6, 2008, e-mail, Joyner provided Outside Counsel Briggs, Human Resources Director Wolfe, and In-House Counsel O'Connor with a copy of an e-mail he had received from State Inspector Lyle in which Lyle confirmed his meeting and discussion with Neal in April regarding compliance with the 60/90 rule. D. & O. at 94; CX 21. Briggs concluded his investigation of Joyner's Guideline Complaint on or about August 6, 2008. Although his final report was not submitted until October 2, 2008, Briggs met with Human Resources Director Wolfe and In-House Counsel O'Connor prior to the termination of Joyner's employment to report on, among other things, "inconsistencies between what [the Complainant]



was alleging with respect to Mr. Neal and [the Complainant's] own actions with respect to the certification letters.” D. & O. at 72. Briggs provided a written summary of the issues surrounding the waste pile and Joyner's allegations regarding Neal. The written summary purportedly dealt with only one issue – “the allegations relating to not including riser food in the reclaim pile and [the Complainant's] facilitation of the certification at the same time that he's accusing Mr. Neal of knowingly violating the consent order.” *Id.* at 74.

On August 12, 2008, Tim Durkin, Georgia-Pacific's Senior Vice President of Operations and Compliance, terminated Joyner's employment. Durkin testified that he terminated Joyner based on his determination that Joyner either lied in his Guideline complaint or misled his immediate supervisors regarding a significant compliance matter for which Joyner was primarily responsible. See Tr. at 549, 557-558, 565-566 (Durkin); see also Tr. at 569 (Durkin testifying: “Mr. Joyner was terminated because he either filed a false claim to us or he prepared a letter which he knowingly knew was false. The issue came down just as simple as that. . . . That's the only reason he was terminated.”). Based on the information provided by Outside Counsel Briggs, Durkin concluded that the Savannah Plant was in compliance with the Consent Order, and that the Company's July 15, 2008 compliance certification letter signed by Neal was accurate. Tr. at 595 (Durkin testifying that “the letter was accurate.”). Durkin testified that he was left with the clear impression that the allegations of Joyner's July 7, 2008, Guideline Complaint of wrongdoing by Neal were false and made in bad faith. *Id.*; see also D. & O. at 95. Durkin testified that he considered such conduct inconsistent with Georgia-Pacific's values and expectations,” and concluded that “termination of Joyner's employment was warranted because he had made false allegations of wrongdoing in his Guideline Complaint. *Id.*

### ***B. Administrative Proceedings***

Joyner filed a complaint with OSHA on September 8, 2008, as amended, alleging violations of the SWDA. OSHA dismissed the complaint on February 18, 2010. Joyner requested a hearing before the Office of Administrative Law Judges (OALJ).

Prior to a hearing, Georgia-Pacific moved for summary decision. On August 19, 2010, the ALJ entered an order granting, in part, and denying, in part, Georgia-Pacific's motion. The ALJ granted Georgia-Pacific's motion to the extent that Joyner's “interactions with the Plant Manager [David Neal] and Business Unit Environmental Manager [Kenneth Blankenship] during the period April 2008 through July 15, 2008, including preparation and submission for signature of the July 15, 2008 certification letter, were not protected activity under the Solid Waste Disposal Act.” ALJ Order on Summary Decision at 9. At the same time, the ALJ ruled that the evidence established that Joyner suffered adverse employment actions on August 1, 2008 (suspension) and on August 8, 2008 (employment termination), and that Joyner filed a timely request for hearing before the Office of Administrative Law Judges. *Id.* at 6-9. The ALJ further held that genuine issues of a material fact remained precluding summary decision “as to whether the complainant's Guideline letter complaint to corporate managers outside his normal supervisory channels and statements to the assigned investigator on July 15, 2008 and July 28, 2008 were protected activity under the Solid Waste Disposal Act,” *id.* at 12, and, if so, whether

the adverse employment actions taken against Joyner were causally related to such protected activity. *Id.* at 17.

The ALJ held an evidentiary hearing on November 8-10, 2011. On December 9, 2011, the ALJ entered a comprehensive decision and order determining that Joyner failed to prove that he suffered adverse action that was motivated by activity protected by the Solid Waste Disposal Act. The ALJ concluded that Respondent's decisions to suspend Joyner with pay on August 1, 2008, and terminate his employment effective August 12, 2008, were not adverse employment actions taken in retaliation for Joyner having engaged in whistleblower-protected activity under the SWDA. D. & O. at 88-89, 94-95. Accordingly, the ALJ dismissed Joyner's complaint.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary has delegated authority to issue final agency decisions in cases arising under the SWDA to the ARB. 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. § 24.110(a). The ARB reviews an ALJ's findings of fact for substantial evidence, and conclusions of law *de novo*. *Muggleston-Utley v. EG&G*, ARB No. 12-025, ALJ No. 2009-CAA-009 (ARB May 8, 2013).

### **DISCUSSION**

Joyner's claims of protected activity flow from his role as Senior Regional Environmental Resource officer responsible for overseeing and preparing Georgia-Pacific's July 2008 letter certifying compliance with terms of the 2006 Consent Order. During the ALJ's three-day hearing, the parties presented extensive evidence in support of their claims and defenses, and the ALJ exhaustively discussed this evidence in his lengthy decision. The ALJ erred, however, in determining that Joyner failed to prove his SWDA whistleblower case. The facts establish that the Act protects the Guideline Complaint Joyner submitted to the Company on July 7, 2008, as Joyner had a reasonable belief of a violation that he sought to report to the company. The facts further establish that Joyner's Guideline Complaint was a motivating factor in Senior Vice President Durkin's decision to terminate him on August 12, 2008. While ordinarily, we would remand for the ALJ to determine in the first instance whether the employer can show by a preponderance of evidence that Georgia-Pacific would have terminated Joyner's employment absent the protected activity, the specific facts presented here compel the determination that Respondent would not have terminated Joyner's employment. Given our determination that Georgia-Pacific's actions against Joyner violated the SWDA whistleblower provision, 42 U.S.C.A. § 6971(a), we remand for the ALJ to determine relief.

### **A. Statutory and Regulatory Framework**

The whistleblower protection provision of the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a), states:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

See also 29 C.F.R. § 24.102(b) (“[i]t is a violation for any employer to . . . retaliate against any employee because the employee has” engaged in protected activity). To prove a violation of the Act, complainants must “demonstrate[] by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.” 29 C.F.R. § 24.109(b)(2). When this showing is made, an employer can avoid liability by “demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.” *Id.* See also *Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013). “[T]he preponderance of the evidence standard requires that the employee’s evidence persuades the ALJ that his version of events is more likely true than the employer’s version. Evidence meets the ‘preponderance of the evidence’ standard when it is more likely than not that a certain proposition is true.” *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 28 (ARB Dec. 30, 2004) (citing *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-001, slip op. at 7 (ARB Apr. 28, 2000)).

### **B. The ALJ Erred In Determining That Joyner Failed To Prove That He Engaged In Protected Activity That Motivated His Termination In Violation Of The SWDA**

#### **1. Joyner’s April and June 2008 complaints to Plant Manager Neal and Business Unit Environmental Manager Blankenship about the application of the riser food to the June 2008 survey were protected under the SWDA**

The ALJ determined in a Decision and Order (issued Aug. 19, 2010), granting in part Georgia-Pacific’s motion for summary decision, that Joyner’s complaints to his supervisors, managers Neal and Blankenship, between April and June of 2008 were not protected under the SWDA. See ALJ Decision and Order (issued Aug. 19, 2010), slip op. at 9-12. The ALJ reasoned that the verbal complaints, which occurred prior to Joyner’s submission of his July 7, 2008, Guideline Complaint, were not protected because the communications occurred within the scope of Joyner’s job duties as a safety official of the company. *Id.* at 12 (ALJ holding that

“when an employee is required to inspect, investigate, correct or report certain environmental matters within the coverage of the Act as part of assigned job duties, such inspections, investigations, corrections and reports are not ‘protected activity’ under the Act when made as part of the normal duties . . .”). Although our decision in this case does not turn on this issue, this legal determination constitutes legal error deserving of correction.

The ARB has established that employees who report safety or environmental concerns as part of their job responsibilities engage in protected activity. *See, e.g., Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030 (ARB Feb. 28, 2012). As the Board noted in *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, ALJ No. 2009-SWD-003 (ARB Feb. 29, 2012), the SWDA has been interpreted to extend whistleblower protection to include internal complaints made to supervisors. *See also Jenkins v. U.S. Env’tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 17 (ARB Feb. 28, 2003). *Accord Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995); *Passaic Valley Sewerage Comm’rs v. DOL*, 992 F.2d 474, 478 (3d Cir. 1993); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). Moreover, the ARB has consistently held that “employees who report safety concerns that they reasonably believe are violations of [federal whistleblower statutes] are engaging in protected activity, regardless of their job duties.” *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op. at 11 (ARB July 27, 2010) (emphasis added). Federal appellate courts agree. *See Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098 (10th Cir. 1999); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997); *Bartlik v. U.S. Dep’t of Labor*, 73 F.3d 100 (6th Cir. 1996); *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926 (11th Cir. 1995); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Mackowiak*, 735 F.2d 1159.

## **2. Joyner’s July 7, 2008, Guideline Complaint is activity protected by the SWDA**

Under the SWDA, no person shall discriminate against any employee because such employee “filed, instituted, or caused to be filed . . . any proceeding” under the SWDA’s relevant provisions. 42 U.S.C.A. § 6971(a). The term “proceeding” set out in 42 U.S.C.A. § 6971(a) encompasses “all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding.” *Lee*, ARB No. 10-021, slip op. at 7; *Jenkins*, ARB No. 98-146. Similarly, the term “any other action” has “been interpreted to extend whistleblower protection . . . to include internal complaints made to supervisors and others.” *Lee*, ARB No. 10-021, slip op. at 7 (citing *Kansas Gas & Elec. v. Brock*, 780 F.2d at 1510-1513 (ERA encompasses as protected activity internal safety or quality control complaints filed by employees with their employers)).

On July 7, 2008, after making a verbal complaint on the company hotline, Joyner submitted a written Guideline Complaint setting out an extensive list of concerns. CX 13 at 10. Joyner included in this written complaint his concern over “potential falsification of records” pertaining to the 2006 Consent Order and the application of the 60/90 Rule to riser food for purposes of the semi-annual survey. CX 13 at 10. Joyner’s internal written complaint to company officials concerning its treatment of riser food for purposes of compliance with the 2006 Consent Order is an internal complaint that falls squarely within the Act’s scope. *Lee*,

ARB No. 10-021, slip op. at 7; see also *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 7 (ARB Jan. 31, 2011) (holding that complainant's "internal complaint through the compliance hotline was protected activity under the STAA.").

The ALJ correctly determined that the SWDA protected Joyner's Guideline Complaint because Joyner reasonably believed that the outside storage of wallboard (riser food) violated the SWDA. See D. & O. at 81-84. To be afforded SWDA protection, a complainant must show a reasonable belief, both subjectively and objectively, that his conduct furthered the SWDA's purposes. *Lee*, ARB No. 10-021, slip op. at 9. The "subjective" component of the reasonable belief is demonstrated by showing that the employee actually believed that the conduct of which he complained constituted a violation of relevant law. *Id.*, slip op. at 9-10; see also *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000). An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as complainant. *Johnson v. The Wellpoint Co., Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 9 (ARB Feb. 25, 2013).

Substantial evidence of record supports the ALJ's determination that Joyner had a reasonable subjective belief of a SWDA violation pertaining to wallboard kept outside of the plant. Joyner's subjective belief of a violation is set forth in the July 7 Guideline Complaint that raises concerns about "unusable board outside on the pavement," and Joyner's belief that the "Georgia EPD 60-90 Rule applies" to that material. D. & O. at 81; see also CX 13. Joyner's role for ensuring the company's compliance with the 2006 Consent Order is further support that Joyner had a subjectively reasonable belief of a violation. As Senior Regional Environmental Resource Officer, Joyner had direct responsibility for overseeing and preparing Georgia-Pacific's documentation certifying compliance with the terms of the 2006 Consent Order. See *supra* at 5. The evidence shows that Joyner discussed the applicability of the 60/90 Rule to outside board with State Inspector Lyle, who stated his position that the outside board fell *within* the scope of the Rule. See D. & O. at 14 (ALJ citing Joyner testimony that "[d]uring a close-out meeting . . . [State Inspector ] Lyle explained that . . . material from the pile had to be used in accordance with the 60-90 Rule or placed in a pile and considered under the consent order surveys."). See also at Tr. 307-309 (Lyle) (same); D. & O. at 31 (citing Lyle testimony that during an April 2008 visit to Savannah plant, "he told the Complainant that the material in the parking lot would be subject to the 60-90 Rule, and if not used in accordance with the rule, it would have to be included in the consent order survey pile."). Joyner also had numerous discussions about this issue with his supervisors, in which he expressed his concern that the wallboard should be included in the survey, and that failure to include the material in the survey violated state law and the Consent Order. D. & O. at 14-15. Indeed, Joyner's subjectively reasonable belief is further underscored because he reported the alleged violation despite his concerns that he may face problems with his supervisors. See Tr. at 128 (Joyner testifying: "I . . . feared for my job when I called the Guideline. But I was trying to do what I thought was right for Georgia-Pacific."). Substantial evidence thus fully supports the ALJ's determination that Joyner had a subjectively reasonable belief that "unusable wallboard stored outside was subject to the 60/90 Rule." D. & O. at 82.

Substantial evidence of record also supports the ALJ's determination that Joyner had an objectively reasonable belief of a violation. The ALJ found, based on uncontroverted testimony by Resource Officer M. Dunnerman that riser food was stored outside at the Savannah facility, as well as at other company facilities: the Las Vegas facility, the Blue Rapids facility, and the Brunswick facility. D. & O. at 83; see also Tr. at 416 (Dunnerman). In addition, the ALJ found that, based on Plant Manager Neal's testimony, there was a continuing order to yard and production supervisors that "wallboard stored outside as riser food was to be bagged and that unbagged wallboard was to be inspected to determine if the integrity of the individual boards have been compromised and if the boards are unusable as riser food they were to be moved to the waste/reject pile." D. & O. at 83; see also Tr. at 498-501 (Neal). Based on the record, substantial evidence fully supports the ALJ's determination that a "reasonably prudent environmental resource with education, experience and knowledge similar to [Joyner] would consider the unusable wallboard as a recovered material subject to the 60/90 Rule whether it sat in an outside staging area or on the waste/reject pile." D. & O. at 83.

***C. The ALJ Erred in Determining that Joyner's Guideline Complaint Was Not a Motivating Factor in the Adverse Action He Suffered***

Under the SWDA, where a complainant proves that he engaged in whistleblower protected activity, the complainant must next show that the activity "caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2). Here, the ALJ's causation determination was error. There is direct and uncontroverted evidence in the record establishing that Joyner's Guideline Complaint, which the ALJ properly found constituted SDWA whistleblower-protected activity, motivated the Company's decision to terminate Joyner's employment.

"A 'motivating factor' is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action." *Onysko v. State of Utah, Dep't Env't'l Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004, slip op. at 10 (ARB Jan. 23, 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)); see also *Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). In making this showing, the "Complainants need only establish that th[e] protected activity was a motivating factor, not *the* motivating factor, in the decision to discharge them." *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 10, n.48 (ARB May 18, 2010). The uncontroverted evidence of record in this case satisfies this showing.

Within approximately three weeks of Joyner's SDWA-protected activity – the July 2008 Guideline Complaint – Human Resources Director Wolfe suspended him on August 1, 2008, and Senior Vice President Durkin then terminated his employment 11 days later. While temporal proximity does not necessarily establish retaliatory intent, it is "evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-034, -036; slip op. at 6 (ARB Mar. 30, 2001). As the ALJ recognized, the proximity in time gives rise to the inference that the suspension was in retaliation for Joyner engaging in protected activity under the SWDA.

D. & O. at 88. However, far more significant to the issue of motivating factor here is that direct and uncontroverted evidence establishes that Joyner's whistleblower protected activity motivated the adverse action he suffered.

First, regarding Joyner's suspension on August 1, 2008, the uncontroverted evidence establishes that Human Resources Director Wolfe suspended Joyner with pay after being informed that the company's investigation into Joyner's Guideline Complaint revealed that Joyner drafted the compliance certification letter that he claimed in his complaint had been falsified. See D. & O. at 32-33, 88. Director Wolfe testified that Joyner was suspended pending further investigation because "that was when I realized from the investigation that was going on that [Joyner] was the author of the letter that he was claiming to be a false submittal to the government." D. & O. at 32; see also Tr. at 328. While Wolfe testified that Joyner's Guideline Complaint did not factor into his decision to suspend Joyner (Tr. at 329), nevertheless the information upon which Wolfe based his decision to suspend Joyner was due to Joyner's Guideline Complaint. The alleged falsified compliance letter that Wolfe did rely on as a basis for suspending Joyner was allegedly false because it conflicted with Joyner's Guideline Complaint. Indeed, the ALJ states in summarizing Wolfe's testimony that Wolfe "suspended the Complainant based on information received from T. O'Connor [Georgia-Pacific's in-house legal counsel] which was based on information he received from the Guideline letter investigator B. Briggs." *Id.* at 33; see also Tr. at 336-337. These facts underscore that Joyner's protected activity (the Guideline Complaint) was a motivating factor for suspending Joyner. But for the Guideline Complaint, there would have been no investigation into whether a false certification letter had been submitted or of Joyner's involvement in the submission of that letter. *Cf. Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012) (holding that because complainant's protected disclosure caused the company to conduct an investigation that, in turn, led to the discovery of information that served as the basis for the complainant's discharge, the complainant's protected activity contributed to the decision to terminate his employment in violation of the whistleblower protection provisions of the Energy Reorganization Act); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012) (holding under the Federal Rail Safety Act that complainant's injury report was a contributing factor in his suspension because the report resulted in the investigation that led to the information that served as the basis for the discipline). See also *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

Second, there is uncontroverted evidence that Joyner's August 12, 2008, termination was motivated by his protected activity. Senior Vice President Durkin testified (as had Wolfe with respect to Joyner's suspension) that Joyner's filing of the Guideline Complaint had no bearing on Durkin's termination decision. D. & O. at 59. However, as the ALJ observed, Durkin testified that after the results of Georgia-Pacific's investigation, Durkin "concluded that [Joyner] either lied in his internal [guideline] complaint *or* misled his immediate supervisors regarding a significant compliance matter for which he was primarily responsible." D. & O. at 95 (emphasis added). Durkin testified that at a meeting with Briggs (the investigator), Wolfe, and several of Georgia-Pacific's attorneys, the results of Briggs' investigation were discussed:

[W]e walked through the facts surrounding the circumstance[s] . . . [a]nd it was determined that either the complaint about Mr. Neal was wrong and it was done in bad faith and/or that [the Complainant] . . . if he really believed the [certification] letter was wrong, he had an obligation to report the letter up, that it was wrong and false and we shouldn't have submitted it . . . it was an issue of the guy . . . was either untruthful in his allegation or is untruthful in the [certification] letter. One of them had to be wrong. In both cases, that was the reason for his discharge. That was the reason I recommended the discharge and we couldn't leave him in that role any longer.

D. & O. at 59, quoting Tr. at 548-549 (Durkin); see also Tr. at 557 (Durkin). The evidence shows that despite Joyner's conflicting actions, Durkin did not consult with Joyner's supervisors to reconcile Joyner's conduct prior to terminating his employment. See Tr. at 608-609, 614 (Durkin); see also Tr. at 550-55, 556 (Durkin testifies that he did not contact State Investigator Lyle prior to terminating Joyner). Durkin testified that he relied on two bases for terminating Joyner: "The whole basis for my recommendation to terminate Joyner was because he either lied to his boss in the preparation of the July 2008 certification letter which was incorrect, *or* he lied to us [in the Guideline Complaint]. And so, we can't leave someone in that role that operated that way. It's just not part of our culture, it's not allowed, it's not tolerated at all." D. & O. at 59, quoting Tr. at 549 (Durkin).

Moreover, the record reflects Durkin's testimony pointing directly to Joyner's protected activity as a motivating factor. As the ALJ noted, Durkin testified that Joyner "was terminated because he either filed a false claim to us [in the Guideline Complaint] or he prepared a [certification] letter which he knowingly knew was false." *Id.*; see also Tr. at 549, 557 (Durkin) (same). While Durkin's reasoning appears to be two-fold, it is undisputed that, based on Durkin's testimony, his reason for terminating Joyner was motivated by his July 2008 Guideline Complaint - a complaint that Durkin believed may have been false in light of the draft certification letter that Joyner submitted for Plant Manager Neal's signature. Having concluded that the certification letter was accurate, Durkin testified that "it was clearly my impression from [the investigation] that [Joyner's Guideline Complaint] was made in bad faith." D. & O. at 61; Tr. at 565-566. Given these facts, if Durkin terminated Joyner's employment because of his involvement in preparing the compliance certification letter, then the rationale for holding that Joyner's protected activity was a motivating factor in his suspension is equally applicable to Durkin's termination decision; but for Joyner's Guideline Complaint, there would have been no investigation into whether a false certification letter had been submitted or of Joyner's involvement in the preparation of that letter.

Durkin's alternative reason for terminating Joyner's employment is of no greater avail in justifying the Company's action. It is no defense to the determination that the Guideline Complaint was a motivating factor in the employment termination decision to assert that Joyner made false claims of violation of the SWDA. "A complainant need not demonstrate that he was motivated by a safety concern rather than some other personal concern when he engaged in



protected activity, only that his belief that a safety violation occurred is reasonable.” *Guay v. Burford’s Tree Surgeons*, ARB No. 06-131, ALJ No. 2005-STA-045, slip op. at 7-8 (ARB June 30, 2008). Therefore, Joyner’s motivation for reporting a violation is not relevant to a determination of a whistleblower violation, since the ALJ has held below that Joyner had a reasonable belief of a safety violation. *Id.*; see also *Melendez*, slip op. at 29-31; *Nichols v. Gordon Trucking*, ARB No. 97-088, ALJ No. 1997-STA-002 (ARB July 17, 1997); *Oliver v. Hydro-Vac Servs.*, No. 1991-SWD-001, slip op. at 8 (Sec’y Nov. 1, 1995); *Minard v. Nerco Delamar Co.*, No. 1992-SWD-001, slip op. at 9-13 (Sec’y Jan. 25, 1994); *Guttman v. Passaic Valley Sewerage Comm’n*, No. 1985-WPC-002, slip op. at 10 (Sec’y March 13, 1992), aff’d *Passaic Valley Sewerage Comm’n v. Dept of Labor*, 992 F.2d 474 (3rd Cir. 1993). See also, *Allen v. Admin. Review Board*, 514 F.3d 468, 477 (5th Cir. 2008).

Given the circumstances presented in this case, the ALJ’s finding that Joyner’s termination was not due to protected activity is not supported by substantial evidence. For the above reasons, we conclude that Joyner’s termination was motivated by his protected acts as the uncontroverted evidence establishes that Durkin’s decision to terminate Joyner was motivated by the July 2008 Guideline Complaint.

***D. The Uncontested Evidence Establishes that the Company Would Not Have Terminated Joyner Absent His Protected Activity***

Where, as here, a complainant meets his or her burden of proof, the employer may avoid liability if it proves by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior. See 29 C.F.R. § 24.109(b)(2); see also *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 8. Having reversed on appeal the ALJ’s determination that the complainant failed to meet his or her burden of proof, ordinarily we would remand to the ALJ for a determination of whether the respondent is able to show an affirmative defense. However, the evidence in this case compels a ruling, without the necessity of remand, that Georgia-Pacific cannot make that showing.<sup>5</sup> The unique evidence in this case clearly demonstrates that Georgia-Pacific would not have terminated Joyner’s employment absent his filing of the July 2008 Guideline Complaint.

Joyner reported what he reasonably believed was an erroneous interpretation by Plant Manager Neal and others as to the scope of riser food materials that must be reported in the survey pursuant to the 2006 Consent Order. See *supra* at 7-8. As the compliance officer for the Savannah Plant, Joyner was responsible for ensuring the Plant’s compliance with the 2006 Consent Order, and indeed he was well positioned to understand the scope of the Consent Order

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<sup>5</sup> See *Hussain v. Gonzales*, 477 F.3d 153 (4th Cir. 2007) (when the result of a remand is a foregone conclusion amounting to a mere formality, the “rare circumstances” exception to the remand rule is met and remand is unwarranted); *Zhong v. U.S. Dep’t of Justice*, 461 F.3d 101, 113 (2d Cir. 2006) (stating that an agency error does not warrant remand when it is clear from the record “that the same decision is inevitable on remand, or, in short, whenever the reviewing panel is confident that the agency would reach the same result upon a reconsideration cleansed of errors”) (citation omitted).

especially given that State Agent Lyle expressed his opinion to Joyner that the Order required that the outside riser food be included in the survey. See *supra* at 2, 5-6. Moreover, Senior Vice President Durkin testified as to the company's procedures for handling Guideline Complaints. He stated that the Company treats all Guideline Complaints "seriously." Tr. at 592 (Durkin). Durkin stated that complaints are "investigate[d] thoroughly," and that the Company's response to a complaint turns on the results of the investigation. Tr. at 592 (Durkin). Durkin agreed that employees who report a suspected violation in good faith should not be subject to retaliation. *Id.* Durkin agreed that "good faith" means that the employee provides complete and truthful information, even if that information is not necessarily correct. *Id.*

In sum, the July 2008 Guideline Complaint is the protected activity in this case and, as has been established, absent the Guideline Complaint there is no basis or reason offered by the Company for terminating Joyner. Durkin testified extensively that Joyner's Guideline Complaint triggered an investigation, and that based exclusively on the results of that investigation, Durkin fired Joyner because either the Guideline Complaint was false or the certification letter was false. See *supra* at 9. In either event, absent Joyner's protected activity, there is no evidence in the record upon which Georgia-Pacific can assert that Joyner would have been terminated.

#### ***E. Remand for Determination of Relief***

Having held that Georgia-Pacific's suspension and termination of Joyner's employment violated the SWDA's whistleblower protection provisions, the regulations implementing the SWDA authorize ARB to order appropriate relief:

If the ARB concludes that the respondent has violated the law, the final order will order the respondent to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of employment, and compensatory damages.

29 C.F.R. § 24.110(d). In view of the length of time that has expired since Joyner's termination, we remand to the ALJ for a determination of appropriate relief, including reinstatement and back pay, afforded under the Act.

## **CONCLUSION**

For the foregoing reasons, the ALJ's Decision and Order is **REVERSED**. The ALJ erred in failing to hold Georgia-Pacific liable for violating the SWDA when it suspended and subsequently terminated Joyner's employment. Georgia-Pacific's actions against Joyner violated the SWDA whistleblower protection provision, 42 U.S.C.A. § 6971. The case is **REMANDED** for a determination by the ALJ of appropriate relief.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**