In the Matter of:

JIMMY R. LEE, **ARB CASE NO. 14-018**

COMPLAINANT, **ALJ CASE NO. 2009-SWD-003**

v. **DATE: May 22, 2015**

PARKER-HANNIFIN CORPORATION,
ADVANCED PRODUCTS BUSINESS UNIT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John M. Brown, Esq., *Law Office of John M. Brown*, Hartford, Connecticut

For the Respondent:
Bruce G. Hearey, Esq. and Daniel L. Messeloff, Esq.; *Ogletree Deakins Nash Smoak & Stewart, P.C.*; Cleveland, Ohio

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge.* Judge Corchado, concurring.

FINAL DECISION AND ORDER

This case, which is before the Board for a second time, arises under the whistleblower protection provisions of the Solid Waste Disposal Act of 1976, 42 U.S.C.A. § 6971 (Thomson/West 2010)(the Act or the SWDA), and the Act's implementing regulations, 29 C.F.R. Part 24. Jimmy Lee filed a complaint with the Occupational Safety and Health Administration (OSHA) claiming that Parker-Hannifin Corporation (Parker-Hannifin) terminated his employment in violation of the SWDA's whistleblower provisions. In its previous decision,

this Board vacated the Administrative Law Judge's (ALJ) decision on the issue of protected activity and remanded for further consideration. *Lee v. Parker-Hannifin Corp*., ARB No. 10-021, ALJ No. 2009-SWD-003 (ARB Feb. 29, 2012). Lee appeals the ALJ's subsequent Decision and Order on Remand (D. & O.), issued December 20, 2013, finding that his conduct in shutting down Evaporator No. 2 was not protected by the Act. We affirm the ALJ's D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated his authority to issue final agency decisions in cases arising under the SWDA to the Administrative Review Board (ARB or Board).[1] The ARB reviews the ALJ's factual findings under the substantial evidence standard, and the ALJ's legal conclusions de novo.[2]

DISCUSSION

The Board thoroughly reviewed the facts, evidence, and burdens of proof applicable to this case in its prior decision remanding this matter to the ALJ, and thus we incorporate our prior decision into this decision. Moreover, we refer to our discussion of the analysis required to determine whether Lee's actions were based on a reasonable belief that his action was protected under the SWDA. In summarily affirming the ALJ's D. & O., we limit our discussion to the most critical points.

Parker-Hannifin employed Lee as its Environmental Health and Safety Coordinator/Facilities Lead at the North Haven plant from December 11, 2006, until November 10, 2008. In March 2007, the Connecticut Department of Environmental Protection (CT DEP) notified Parker-Hannifin that it had concerns regarding the compliance of the evaporators used at the facility to reclaim precious metals from the hazardous electroplating wastewater.[3] Lee was tasked with compiling the information needed to respond to CT DEP's concerns. Chris Roman, the Manufacturing Manager at the facility, and Lee worked with Apex Environmental, a consulting firm, to analyze wastewater samples and produce a report. On November 1, 2007, Lee and Roman met with an Apex representative to review the results of the sampling and to discuss treatment options. Lee requested a follow-up from Apex on October 27, 2008, and

---

[1] *See* 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). *See also* 29 C.F.R. § 24.110(a).

[2] 29 C.F.R. § 24.110(b); *Tomlinson v. EG&G Def. Materials*, ARB No. 11-024, ALJ No. 2009-CAA-008 (ARB Jan. 31, 2013).

[3] If the concentration of precious metals in electroplating wastewater falls below a certain limit, the wastewater may not be treated on site. RX GG at 1; HT at 17-18; 328-329. If it is higher, the evaporators qualify for an exemption.

received a response indicating that the sampling did not qualify for the exemption. Lee forwarded the response to a management team, who informed Lee they would review the issue and meet with him between November 18 and November 20. At a meeting on October 31, Lee met with Chu, the North Haven Business Unit Manager, who told Lee that Evaporator No. 2 would continue operating and that Lee did not have authority to shut the evaporator down. At that meeting, Chu also confirmed that a manager would come to New Haven the following week to investigate his concerns. On November 4, 2008, Lee took the unilateral action of shutting down the evaporator and locking access to it. Chu suspended Lee that day and terminated his employment on November 10, 2008.

The undisputed reason for terminating Lee's employment was the fact that he shut down Evaporator No. 2 and padlocked it to prevent access. The reversible error requiring remand, when this case was previously before the Board, involved the ALJ's failure to recognize that conduct may under certain circumstances constitute SWDA-protected activity. For this reason, the Board instructed the ALJ on remand to reconsider Lee's conduct and, in particular, to determine whether Lee reasonably believed (both subjectively and objectively) that his actions on November 4, 2008, were in furtherance of the purposes of the SWDA, and thus protected under the Act. In reaching his conclusion, the ALJ considered the fact that concerns regarding the continuing qualification of the evaporator under the precious metals exemption were first raised in November 2007, but that Lee did not raise this issue in his report to CT DEP on October 14, 2008. In addition, Lee did not follow up on management's requests for updates to the issue between November 2007 and October 2007. The ALJ also found it persuasive that Lee knew by October 31st that he did not have the authority to shut down the evaporator, and that it is undisputed that there was no emergency or threat to the environment that would have justified the actions Lee took on November 4th.

Substantial evidence supports the ALJ's essential factual findings and his ultimate conclusion that Lee did not have a subjectively or objectively reasonable belief that his action in shutting down the evaporator and locking it was taken pursuant to his employment authority, or otherwise within the rights the SWDA affords employees. The ALJ thoroughly examined all of Lee's evidence and explained why that evidence failed to establish protected activity. The record also supports the ALJ's thorough, well-reasoned legal conclusions. None of the arguments Lee presented on appeal have persuaded us to disturb the ALJ's ruling on his complaint.

CONCLUSION

The ALJ's Decision and Order on Remand dismissing Lee's complaint is **AFFIRMED.**

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado concurs:

This is a difficult case arising under ambiguous SWDA whistleblower law. I concur in the result, but I do not understand why the majority imposed an additional hurdle on SWDA whistleblowers that is not required by the statutes or regulations or SWDA precedent. The statute and regulations protect, among other things, participation "in any manner" in a "proceeding" that carries out the purposes of the SWDA.[4] I understand why the majority interprets this law to necessarily mean lawful conduct in the sense of complying with local, state, and federal laws. But I do not see how the majority makes the leap to conclude that the employee must also prove that he complied with his employment authority in committing an act that lawfully carried out the purposes of the SWDA. The majority expressly held in finding no protected act, "Lee did not have a subjectively or objectively reasonable belief that his [Lee's] action in shutting down the evaporator and locking it was taken *pursuant to his employment authority*." Supra at 3 (emphasis added). But, in my view, the majority does not provide sufficient statutory textual analysis in support of this added burden to prove "employment authority." The first ALJ ruling appeared to be on the right track by focusing on the actual words in the statute and regulations to decipher its ambiguous intent.

In my view, where an employee lawfully takes action to carry out the SWDA, he has proven protected activity and next he must show that such action motivated, at least in part, the employer to act unfavorably towards him. The fact that the employee's lawful actions also included or simultaneously constituted "insubordination," means that the employer may have had non-retaliatory reasons for firing the employee. If so, the ALJ will undoubtedly face a very difficult causation question, keeping in mind that the employee bears the burden of proof on this issue. If the ALJ concludes that the insubordination caused the termination of employment and it was not the efforts to carry out the SWDA, then the ALJ would dismiss the claim on the issue of causation.

---

[4] See 42 U.S.C.A. § 6971; 29 C.F.R. § 24.102 (2014).

Several facts make this case very difficult and I will mention only a few. First, the central focus was Lee's conduct regarding the Evaporator No. 2, a unit that processed *hazardous* silver *cyanide,* gold wastewater, and rinse waters. Second, Evaporator No. 2 caused CT DEP to have "concerns regarding ongoing RCRA compliance" and nothing in the record demonstrates that CT DEP considered the violation resolved before Lee shut it down. Third, three days before Lee shut down Evaporator No. 2, one of Parker-Hannifin's consulting experts (APEX) on environmental compliance issues indicated that it still had "concerns" over compliance issues. D. & O. at 7, n.5; 12, n.9. Most importantly, the ALJ found that "Lee had an objectively and subjectively reasonable belief that Evaporator No. 2's continued operation would violate the SWDA and/or pertinent environmental laws on November 4, 2008." *Id.* at 20. Lee's action directly caused Parker-Hannifin to investigate the compliance issues surrounding Evaporator No. 2. So, it seems to me, the ALJ's findings establish that Lee's actions carried out the purposes of the SWDA without violating any local, state, or federal laws. The question should have been whether the protected aspect of this action motivated Parker-Hannifin to fire him, a tough question to answer in this case.

But in the end, though a very close call, there seems to be just enough findings and evidence to infer that the ALJ implicitly rejected protected activity as a motivating factor. More specifically, ALJ's findings suggest that Parker-Hannifin focused on the insubordinate nature of Lee's conduct and was not motivated by Lee's concerns and efforts to enforce compliance with the SWDA. Parker-Hannifin hired Lee to assist with environmental issues. It also hired an outside consultant to assist with the compliance issues. A high level manager (Connell) planned to visit the North Haven facility on November 4, 2008, to investigate Lee's concerns. D. & O. at 14. Accordingly, Lee was told not to shut down Evaporator No. 2, but he did anyway, even though there was no emergency that prevented him from waiting. Connell could have overridden the lock and restarted Evaporator No. 2. Instead, she performed an investigation and felt that Evaporator No. 2 was in compliance. All of these factual findings are undisputed and circumstantial evidence that supports the ALJ's implicit finding that it was the insubordination (per employment policies Parker-Hannifin presented) and not the enforcement of SWDA issues that motivated Parker-Hannifin to fire Lee.

LUIS A. CORCHADO
Administrative Appeals Judge